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133
No. 2530

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHAS. B. BLESSING, as Trustee of the Estate of
PACIFIC MOTOR CAR COMPANY, a Cor-
poration, Bankrupt,

Petitioner,

vs.

G. A. BLANCHARD and W. H. WINN,

Respondents.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of Law,
a Certain Order of the United States District
Court for the Northern District of
California, First Division.

Filed

JAN - 6 1915

F. D. Monckton,
Clerk.

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Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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RECORD ACCOMPANYING PETITION FOR
REVISION.

*In the District Court of the United States in and for
the Northern District of California, First Division.*

No. 8722—IN BANKRUPTCY.

In the Matter of PACIFIC MOTOR CAR COM-
PANY, a Corporation,

Bankrupt.

**Praecipe for Transcript of Record for Use on
Petition for Revision.**

To the Clerk of the Above-entitled Court:

Please prepare a transcript of the record in the above-entitled matter to be used by the undersigned trustee on petition for revision by the United States Circuit Court of Appeals for the Ninth Circuit, under Section 24b of the Bankruptcy Act, of that certain order of the above-entitled court made and entered herein on the 23d day of October, 1914, affirming the order of A. B. Kreft, Esq., a referee in bankruptcy of the above-entitled court, made on the 24th day of June, 1914, allowing as priority under Section 64b (4) of the Bankruptcy Act the claims of G. A. Blanchard for \$145.20, and of W. H. Winn for \$245.00.

Please include in the said transcript of record the following documents:

- (1) This Praecipe.
- (2) Claim of G. A. Blanchard, to be designated “Exhibit ‘A’ to Petition for Revision.”

- (3) Claim of W. H. Winn, to be designated "Exhibit 'B' to Petition for Revision."
- (4) Certificate of referee on review, to be designated "Exhibit 'C' to Petition for Revision."
- (5) Order of District Judge, to be designated "Exhibit 'D' to Petition for Revision." [1*]

Please omit from all documents, except this Praeclipe, the title of court and cause, and refer to the same merely as "Title of Court and Cause"; and also omit the notaries' statements on the said claims, and refer to the same merely as "Duly subscribed and sworn to"; and also omit all endorsements on the backs of the said documents, with the exception of filing marks and the allowances of the referee in bankruptcy; and also omit the letters of attorney on the backs of the said claims.

Dated November 30, 1914.

HELLER, POWER & EHRLMAN,
REUBEN G. HUNT,

Attorneys for Chas. B. Blessing, Trustee of the Estate of the Above-named Bankrupt.

Receipt of a copy of the foregoing Praeclipe is hereby admitted this 30th day of November, 1914.

R. H. COUNTRYMAN,
Attorney for the Said G. A. Blanchard and W. H. Winn.

[Endorsed]: Filed Nov. 30, 1914. At 5 o'clock and —— min. P. M. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

*Page-number appearing at foot of page of original certified Record.

Exhibit "A" to Petition for Revision [Claim of G. A. Blanchard].

(Title of Court and Cause.)

At San Francisco, in said Northern District of California, on the 27th day of May, A. D. 1914, came G. A. Blanchard, of San Francisco, in the county of San Francisco, in said Northern District of California, and made oath and says that Pacific Motor Car Company, the person whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly, indebted to said deponent, in the sum of One Hundred and Forty-five and 20/100 (\$145.20) Dollars; that the consideration of said debt is as follows:

Claimant was employed by said bankrupt as General Manager of said bankrupt, at an agreed compensation or wages or salary of Three Hundred (\$300) Dollars per month. That during the month of April, 1914, this claimant performed work and rendered services for said bankrupt. That of said sum of Three Hundred Dollars there has been paid the sum of \$154.80, and no more, leaving a balance due this claimant for his wages or compensation for said month of April, 1914, the sum of \$145.20.

That no part or portion of said sum has been paid. That no part of said debt has been paid. That said sum of \$300 was the wages or salary of this claimant for said month of April, 1914, and said balance of \$145.80 is the unpaid portion of claimant's wages

and salary for said month of May, 1914. That there are no setoffs or counterclaims to the same. That no note has been received for such account, nor any judgment rendered thereon; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever. Claimant claims a *preferred* [3], to the full amount of \$145.20, for the reason that claimant was working for wages and performed services for said bankrupt within a period of sixty (60) days prior to the adjudication herein.

(Signed) G. A. BLANCHARD.

(Duly subscribed and sworn to.)

[Endorsed]: Allowed for \$145.20. Priority. June 24, 1914. A. B. Kreft, Referee. Filed Jun. 2, 1914, at 10 o'clock and — min. A. M. A. B. Kreft, Referee in Bankruptcy. [4]

Exhibit "B" to Petition for Revision [Claim of W. H. Winn].

(Title of Court and Cause.)

At San Francisco, in said Northern District of California, on the 26th day of May, A. D. 1914, came W. H. Winn, of the City of San Francisco, in the County of San Francisco, in said Northern District of California, and made oath, and says that Pacific Motor Car Company, the person whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent, in the

sum of Three Hundred and 20/100 (\$320.00) Dollars; that the consideration of said debt is as follows:

Claimant was employed by said bankrupt as Superintendent of shop, and that for more than eighteen (18) months last past he has been the Superintendent of the shop of said bankrupt, working in and about the shop in the repair of automobiles and in the service department of said bankrupt; that the salary or compensation of claimant during said period of eighteen months last past has been the sum of One Hundred and Fifty (\$150) Dollars per month, payable at the end of each and every calendar month. That for the month of March, 1914, said claimant received the sum of \$130.00, leaving due, owing and unpaid to him on account of said monthly salary for said month of March, the sum of \$20.00. That no part or portion of the salary of this claimant for the month of April, 1914, has been paid, and no part or portion of his said salary for the month of May, 1914, has been paid, there being due, owing and unpaid to claimant at the present time from said bankrupt, the sum of \$320.00; that no part of said debt has been paid; that there are no offsets or counterclaims to the same. That on April 30th, 1914, claimant was notified to continue work and to keep what men he needed in said shop and claimant has reported for duty on each [5] day since said 1st day of May, 1914. That no note has been received for such account, nor any judgment rendered thereon; and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of

security for said debt whatever. Claimant claims a preferred claim to the full amount of said \$320.00 for the reason that claimant was working for wages and performed services for said bankrupt within a period of sixty (60) days prior to the adjudication herein.

(Signed) WM. H. WINN.

(Duly subscribed and sworn to.)

[Endorsed]: Allowed for \$245.00. Priority. June 24/14. A. B. Kreft, Referee. Filed Jun. 2, 1914, at 10 o'clock and —— min. A. M. A. B. Kreft, Referee in Bankruptcy. [6]

Exhibit "C" to Petition for Revision.

(Title of Court and Cause.)

No. 8722.

Report of Referee on Petitions of Trustee to Review Orders Allowing Claims of G. A. Blanchard and W. H. Winn.

To the Honorable MAURICE T. DOOLING, Judge of the District Court of the United States in and for the Northern District of California:

The undersigned, referee in bankruptcy, to whom was referred the above-entitled matter, respectfully certifies and reports:

That on June 24, 1914, orders were made herein allowing a claim of G. A. Blanchard for \$145.20 and a claim of W. H. Winn for \$245, as claims entitled to priority under Section 64 (4) of the Bankruptcy Act, such orders being endorsed upon the claims. The trustee feeling aggrieved thereat, on June 29, 1914,

filed petitions to review said orders. R. G. Hunt, Esq., appeared as counsel for trustee, and R. H. Countryman, Esq., as counsel for claimants.

The claim of G. A. Blanchard recited that the claimant was employed by said bankrupt as general manager at an agreed compensation or wages or salary of \$300 per month. The claim of W. H. Winn recites that the claimant was employed by said bankrupt "as superintendent of the shop, . . . working in and about the shop in the repair of automobiles and in the service department of said bankrupt," and that his salary was \$150 a month.

The testimony shows that Winn had authority to hire and discharge men in his department, but was subject to the control and direction of Blanchard as general manager; that he performed labor about the shop in like manner as the men working under him, in the repair of automobiles and general shop work. Blanchard, [7] as general manager, had power to hire and discharge men, and to superintend the salesmen, himself working in the capacity of a salesman. He also had the general control and direction of the workmen in the employ of the bankrupt in all its departments. He was not an officer, director or stockholder of the bankrupt, and received no compensation for his services other than a salary of \$300 a month.

Counsel for trustee contends, first, that the wages of these employees exceeded a total amount of \$1500 a year each, and that they are not, therefore, entitled to priority, by virtue of the provision of section 1, subd. 27; that such section must be read in connec-

tion with sec. 64b. (4). Sec. 1 (27) reads: “‘Wage-earner’ shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding \$1500 per year.” Sec. 64b (4), defining debts which are entitled to priority, reads: “Wages due to workmen, clerks, traveling or city salesmen or servants which have been earned within three months before the date of the commencement of the proceedings, not to exceed \$300 for each claim.”

There is some authority in support of the contention that where the wages exceed \$1500 a year, priority cannot be granted. *In re Rose*, 1 A. B. R. 73; and the recent case of *In re Becker & Company*, opinion by the referee, 31 A. B. R. 596.

The decided weight of authority, however, is that the provisions of section 1 (27) have reference to those who may be proceeded against in an involuntary proceeding, and is not controlling upon the question as to who is entitled to priority.

Remington on Bankruptcy, p. 1338, sec. 2171;

In re Scanlan, 3 A. B. R. 202;

In re Carolina Cooperage Co., 3 A. B. R. 154;

In re Gurewitz, 10 A. B. R. 350;

In re Smith, 11 A. B. R. 647. [8]

In my opinion the provision of section 1 (27) should not be read in connection with sec. 64b (4) in determining priority of labor claims.

The second contention of the trustee is that neither of said claimants is a workman, clerk or servant within the meaning of sec. 64b (4).

As to Blanchard, he is not, in my opinion, a workman or a clerk, and as to whether he is a servant

within the meaning of the section, I have grave doubt.

In the case of *In re Calwell*, 21 A. B. R. 236, the Court says with reference to the scope to be given to the word "servant" in this section:

"A definition of the word which is very comprehensive and meets my view as to its legal meaning is that given in 20 Am. & Eng. Encyclopedia of Law, 2d edition, 11: 'A servant is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling, and in such service remains entirely under the control and direction of the latter; . . . The relation of master and servant exists where the employer has the right to select the employee; the power to remove or discharge him; the right to direct both what work shall be done and the way and manner in which it shall be done.' "

It has been shown in this case that the capital stock of this corporation is owned by one individual. No doubt Blanchard was subject to his control in all things. He had no voice in the policies of the company, not being a stockholder, officer or director thereof, and in my opinion is a servant, according to the above definition. Priority to wage claimants is limited to \$300. If the claimant is otherwise entitled to priority, it is immaterial whether the \$300 is earned within one month or within three months of the commencement of the proceedings.

The other view as to the meaning of the word "servant" is [9] that it is not as broad as the common-law definition of that word; that the words

“workman, clerk and servant” are to be given a common, every-day, popular meaning, and this does not include high-salaried officers of a corporation.

In re Smith, 11 A. B. R. 646;

Grubbs-Wiley Grocery Co., 2 A. B. R. 444;

In re Carolina Cooperage Co., 3 A. B. R. 157;

Remington on Bankruptcy, p. 136, sec. 2169;

In re Albert A. Brown & Company, 22 A. B. R. 496; in which latter case priority was denied to the claim of a manager in charge of the branch office of a broker.

In some of the cases cited in which the word “servant” is given a more restricted meaning than the common-law definition it appeared that the claimant was closely identified with the business of the bankrupt, being either an officer, director or stockholder therein, and in a measure responsible for the policies of the bankrupt and for the contraction of his debts. It is my opinion that the word “servant” should be given a restricted meaning in line with the cases which hold that the word “servant” should be given its “common, every-day, popular meaning.”

The act not defining the word “servant,” and section 125, defining “wage-earner,” not applying, each case must be determined by the character of the services rendered.

As to Blanchard, because of the absence of any financial or controlling interest in the business, he being only a salaried employee, I granted priority to his claim, but as stated, not without grave doubt as to whether the facts shown bring him within the meaning of the section.

As to Winn, while he had charge of the workmen in his department, he worked along with them, performing manual labor as a mechanic, and in my opinion comes within the meaning of the [10] words "workman and servant."

Respectfully submitted.

San Francisco, September 17th, 1914.

(Signed) ARMAND B. KREFT,
Referee.

The following papers are transmitted herewith:

Claim of G. A. Blanchard;

Claim of W. H. Winn;

And petitions to review said claims.

[Endorsed]: At 4 o'clock P. M. Filed Sep. 17, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [11]

Exhibit "D" to Petition to Revision [Order Affirming Order of Referee].

(Title of Court and Cause.)

No. 8722.

REUBEN G. HUNT, Esq., Attorney for Trustee.

ROBERT H. COUNTRYMAN, Esq., Attorney for Claimants.

The order of the Referee allowing the claims of G. A. Blanchard and W. H. Winn as claims entitled to a priority is hereby affirmed.

October 23d, 1914.

(Signed) M. T. DOOLING,
Judge.

[Endorsed]: At 5 o'clock P. M. Filed Oct. 23, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [12]

[Certificate of Clerk U. S. District Court to Transcript of Certain Papers.]

I, W. B. Maling, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify the foregoing 12 pages, numbered from 1 to 12 inclusive, to contain full, true, and correct copies of Praeclipe, Claim of G. A. Blanchard, Claim of W. H. Winn, Certificate of Referee on Review and Order of District Judge as the same now remain on file and of record in this office, in the matter of Pacific Motor Car Company, a corporation, Bankrupt, No. 8722; said copies having been prepared pursuant to and in accordance with "Praeclipe" (copy of which is embodied herein).

I further certify that the cost for preparing the above-mentioned copies is the sum of Six Dollars (\$6.00), and that the same has been paid to me by Reuben G. Hunt, Esq., Attorney for Trustee.

In witness whereof, I have hereunto set my hand and the seal of said District Court this 21st day of December, 1914.

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp Canceled Dec. 21, 1914. C. W. C.] [13]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

CHAS. B. BLESSING, as Trustee of the Estate of
PACIFIC MOTOR CAR COMPANY, a Cor-
poration, Bankrupt,

Petitioner,

vs.

G. A. BLANCHARD and W. H. WINN,
Respondents.

Petition for Revision.

To the Honorable Judges of the United States Cir-
cuit Court of Appeals for the Ninth Circuit:

The petition of Chas. B. Blessing, as trustee of the
estate of Pacific Motor Car Company, a corporation,
bankrupt, respectfully shows unto this Court:

I.

That on the 15th day of May, 1914, the said Pacific
Motor Car Company, a corporation, filed in the Dis-
trict Court of the United States in and for the North-
ern District of California, its voluntary petition in
bankruptcy, and thereafter and on the 21st day of
May, 1914, the said District Court made an order
adjudicating the said corporation a bankrupt upon
the said petition, and referring further proceedings
in the matter of the administration of the estate of
the said bankrupt to A. B. Kreft, Esq., a referee in
bankruptcy of the said District Court. Thereafter
and on the 3d day of June, 1914, the said Chas. B.

Blessing was appointed trustee of the estate of the said bankrupt by its creditors at their first meeting, which said appointment was thereupon and on said 3d day of June, 1914, approved by the said referee. Thereafter and on the said 3d day of June, 1914, the said Chas. B. Blessing qualified as such trustee, and ever since the said 3d [14] day of June, 1914, the said Chas. B. Blessing has been, and now is, the appointed, qualified and acting trustee of the estate of the said bankrupt.

II.

That on the 2d day of June, 1914, the said G. A. Blanchard and the said W. H. Winn filed in the said bankruptcy matter with the said referee their claims against the estate of the bankrupt in the sums of \$145.20 and \$320.00, respectively, asserting the right to have the said claims allowed as priority in the said amounts under the provisions of Section 64b (4) of the Bankruptcy Act, true copies of which said claims duly certified by the clerk of the said District Court are hereto attached and marked Exhibits "A" and "B," respectively.

III.

That thereafter and on the 24th day of June, 1914, the said referee made an order allowing as priority under Section 64b (4) of the Bankruptcy Act the said claim of G. A. Blanchard for the sum of \$145.20 and the said claim of W. H. Winn for the sum of \$245.00.

IV.

That thereafter and on the 29th day of June, 1914, the said trustee in bankruptcy filed with the said ref-

eree his petition for the review by the said District Court of the said order of the said referee, and thereafter and on the 17th day of September, 1914, the said referee filed in the said District Court his certificate on such review, a true copy of which said certificate duly certified by the clerk of the said District Court and is hereto attached and marked Exhibit "C."

V.

That thereafter and on the 23d day of October, 1914, the said District Court made an order in the said matter affirming the said order of the said referee, a true copy of which said order [15] duly certified by the clerk of said District Court is hereto attached and marked Exhibit "D."

Your petitioner charges the fact to be that said District Court erred as a matter of law in affirming the said order of the said referee for the following reasons, to wit:

(a) The said G. A. Blanchard was not a workman, clerk, traveling salesman or servant of the bankrupt at the time the services mentioned in his said claim were performed within the meaning of Section 64b (4) of the Bankruptcy Act, and the said claim should have been allowed as an ordinary claim only and not one entitled to priority under the said Section of the Bankruptcy Act.

(b) The said W. H. Winn was not a workman, clerk, traveling salesman or servant of the bankrupt at the time the services mentioned in his said claim were performed within the meaning of Section 64b (4) of the Bankruptcy Act, and the said claim should

have been allowed as an ordinary claim only and not one entitled to priority under the said Section of the Bankruptcy Act.

WHEREFORE, your petitioner, as such trustee in bankruptcy, feeling aggrieved because of said order of said District Court, asks that the same may be revised in matter of law by this Honorable Court as provided in Section 24b of the Bankruptcy Act and the Rules of Practice, in such cases provided and that the said order may be reversed, and for such other and further relief as may be just and proper.

Dated December 21st, 1914.

REUBEN G. HUNT,

HELLER, POWERS & EHRMAN,

Attorneys for Chas. B. Blessing, Trustee of the
Estate of Pacific Motor Car Company, a Corpora-
tion, Bankrupt. [16]

State of California,

City and County of San Francisco,—ss.

I, Chas. B. Blessing, the trustee of the estate of the Pacific Motor Car Company, a corporation, bankrupt, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements therein contained are true according to the best of my knowledge, information and belief.

CHAS. B. BLESSING.

Subscribed and sworn to before me this 21st day
of December, 1914.

[Seal]

L. H. CONDON,

Notary Public in and for the City and County of San
Francisco, State of California. [17]

[Endorsed]: No. 2530. United States Circuit
Court of Appeals for the Ninth Circuit. Chas. B.
Blessing, as Trustee of the Estate of Pacific Motor
Car Company, a Corporation, Bankrupt, Petitioner,
vs. G. A. Blanchard and W. H. Winn, Respondents.
Petition for Revision Under Section 24b of the
Bankruptcy Act of Congress, Approved July 1, 1898,
to Revise, in Matter of Law, a Certain Order of the
United States District Court for the Northern Dis-
trict of California, First Division.

Filed December 21, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —

CHAS. B. BLESSING, as Trustee of the Estate of
PACIFIC MOTOR CAR COMPANY, a Cor-
poration, Bankrupt,

Petitioner,

vs.

G. A. BLANCHARD and W. H. WINN,
Respondents.**Notice of Filing of Petition for Revision.**To G. A. Blanchard, Esq., to W. H. Winn, Esq., and
to R. H. Countryman, Their Attorney:

You and each of you are hereby notified that on the 21st day of December, 1914, at 2:30 o'clock P. M., we will present and file in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, at the United States Postoffice Building, Seventh and Mission Streets, San Francisco, California, the petition of Chas. B. Blessing, as trustee of the estate of Pacific Motor Car Company, a corporation, bankrupt, for revision by the said Circuit Court of Appeals of the order of the District Court of the United States, in and for the Northern District of California, made on the 23d day of October, 1914, affirming the order of A. B. Kreft, Esq., a referee in bankruptcy of the said District Court, heretofore and on the 24th day of June, 1914, made allowing as priority under Section 64b (4) of the

Bankruptcay Act the claims of G. A. Blanchard for \$145.20 and of W. H. Winn for \$245.00.

Dated December 21st, 1914.

HELLER, POWERS & EHRMAN,
REUBEN G. HUNT,

Attorneys for Chas. B. Blessing, Trustee of the
Estate of the Said Bankrupt.

Receipt of a copy of the foregoing notice of filing
of petition for revision and said petition for revision
is hereby admitted this 21st day of December, 1914,
at 1:55 P. M.

R. H. COUNTRYMAN,
Attorney for G. A. Blanchard and W. H. Winn.

[Endorsed]: No. 2530. In the Circuit Court of
Appeals of the United States, Ninth Circuit. Chas.
B. Blessing, Petitioner, vs. G. A. Blanchard et al.,
Respondents. Notice of Filing of Petition for Re-
vision. Filed Dec. 21, 1914. F. D. Monckton, Clerk.

No. ~~2125~~

2530

In the United States Circuit Court
of Appeals for the Ninth
Circuit.

CHAS. B. BLESSING, as Trustee of the Estate
of PACIFIC MOTOR CAR COMPANY, a
corporation, Bankrupt,

Petitioner.

vs.

G. A. BLANCHARD and W. H. WINN,

Respondents.

BRIEF FOR PETITIONER.

HELLER, POWERS & EHRMAN,
REUBEN G. HUNT,

Attorneys for Petitioner.

Filed this.....day of February, 1915.

FRANK D. MONCKTON, *Clerk,*

By....., *Deputy Clerk.*

Filed

FEB 26 1915

F. D. Monckton



No. 2435.

In the United States Circuit Court of Appeals for the Ninth Circuit

CHAS. B. BLESSING, as Trustee of the Estate
of PACIFIC MOTOR CAR COMPANY, a
corporation, Bankrupt,

Petitioner.

vs.

G. A. BLANCHARD and W. H. WINN,

Respondents.

Brief for Petitioner.

Statement of the Case

The bankrupt was engaged in the buying, selling and repairing of automobiles at San Francisco.

G. A. Blanchard filed with the referee in bankruptcy a labor claim against the bankrupt's estate for \$145.20, asserting his right to priority of payment of the same under the provisions of the bankruptcy act. In his claim he set forth that he was employed by the bankrupt corporation as its general manager at an agreed salary of \$300.00 per month,

and that the sum of \$145.20 represents the balance due him upon his salary earned within three months of the filing of the bankruptcy petition. The trustee in bankruptcy contested his right to priority of payment, but, after a hearing, the referee allowed the claim as entitled to priority of payment under Section 64 b (4) of the Bankruptcy Act for \$145.20. (Trans. p. 3.)

W. H. Winn filed with the referee a labor claim against the bankrupt's estate for \$320.00, asserting his right to priority of payment of same under the provisions of the bankruptcy act. In his claim he set forth that he was employed by the bankrupt as superintendent of its service department at an agreed salary of \$150.00 per month, and that the sum of \$320.00 represents the balance due him upon such salary for the months of March, April and May, 1914. The trustee contested his right to priority of payment, but, after a hearing, the referee allowed the claim as entitled to priority of payment under Section 64 b (4) of the Bankruptcy Act for \$245.00, the same being the amount due for services performed within three months of the filing of the bankruptcy petition. (Trans. p. 4.)

Section 64 b (4) of the Bankruptcy Act provides as follows:

“The debts to have priority . . . and to be paid in full out of bankrupt estates, and the order of payment shall be . . . wages due to workmen, clerks, traveling or city salesmen, or

servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed \$300.00 to each claimant.”

The trustee filed with the referee his petitions for a review by the District Court of these orders, and the referee prepared and filed in the District Court his certificate on review, combining both orders in one certificate. In this certificate he sets forth the facts adduced at the hearings, and stated in detail his reasons for deciding as he did, acknowledging, however, that as to Blanchard’s claim:

“He is not, in my opinion, a workman or clerk, and as to whether he is a servant within the meaning of the section, I have grave doubt.” (Trans. p. 8.)

and further:

“I have granted priority to his claim, but as stated, not without grave doubt as to whether the facts shown bring him within the meaning of the section.”

The certificate of the referee sets forth the facts adduced at the hearings before him as follows:

“The claim of G. A. Blanchard recited that the claimant was employed by said bankrupt as general manager at an agreed compensation or wages or salary of \$300 per month. The claim

of W. H. Winn recites that the claimant was employed by said bankrupt ‘as superintendent of the shop . . . working in and about the shop in the repair of automobiles and in the service department of said bankrupt, and that his salary was \$150 a month’.

The testimony shows that Winn had authority to hire and discharge men in his department, but was subject to the control and direction of Blanchard as general manager; that he performed labor about the shop in like manner as the men working under him, in the repair of automobiles and general shop work. Blanchard as general manager, had power to hire and discharge men, and to superintend the salesmen, himself working in the capacity of a salesman. He also had the general control and direction of the workmen in the employ of the bankrupt in all its departments. He was not an officer, director or stockholder of the bankrupt, and received no compensation for his services other than a salary of \$300 a month.” (Trans. p. 7.)

A hearing was had before the District Judge, and he made one order affirming the orders of the referee. At this hearing, Blanchard and Winn asserted that even though they were not entitled to priority of payment under Section 64 b (4) of the Bankruptcy Act, they were entitled to such priority under Section 64 b (5) of that act taken in con-

junction with Section 1204 of the Civil Code of California, which last named section gives priority to workmen, clerks and servants.

The matter is now before the Circuit Court of Appeals upon the trustee's petition for a revision of the District Court's order.

Specification of Errors Relied Upon

1. The referee and the District Judge erred in allowing the claim of G. A. Blanchard as entitled to priority of payment under Section 64 b (4) of the Bankruptcy Act, for the reasons: (1) Section 1, Subd. 27, of the Bankruptcy Act limits the benefits of Section 64 b (4) to those whose salary does not exceed \$1500 per year, and Blanchard's salary was \$3600 per year; (2) Blanchard was not a workman, clerk, traveling or city salesman, or servant, within the meaning of Section 64 b (4).

2. The referee and the District Judge erred in allowing the claim of W. H. Winn as priority under Section 64 b (4) of the Bankruptcy Act, for the reasons: (1) Section 1, Subd. 27, of the Bankruptcy Act limits the benefits of Section 64 b (4) to those whose salary does not exceed \$1500 per year, and Winn's salary was \$1800 per year; (2) Winn was not a workman, clerk, traveling or city salesman, or servant, within the meaning of Section 64b (4).

Brief of the Argument

I.

Blanchard and Winn are excluded from Section 64 b (4) of the Bankruptcy Act because their compensation exceeded \$1500 per year.

Bankruptcy Act, Section 64 b (4);
 Bankruptcy Act, Section 1, Subd. 27;
In Re Rose, 1 Am. B. R. 68;
In Re August Becker & Co., 31 Am. B. R. 596.

II.

Neither the general manager of a corporation, such as Blanchard, nor the superintendent of its service department, such as Winn, is entitled to priority.

In Re Crown Point Brush Co., 29 Am. B. R. 638, 200 Fed. Rep. 882;
In Re Albert O. Brown & Co., 22 Am. B. R. 496, 171 Fed. 281;
In Re Greenberger, 30 Am. B. R. 117, 203 Fed. Rep. 583.

III.

Neither Blanchard nor Winn was a “servant” within the meaning of Section 64 b (4).

In Re Albert O. Brown, 22 Am. B. R. 496, 171 Fed. 281;
In Re Zotti, 23 Am. B. R. 607;

In Re Smith, 11 Am. B. R. 646;
In Re Grubbs-Wiley Grocery Co., 2 Am.
B. R. 442, 96 Fed. Rep. 183;
In Re Carolina Cooperage Co., 3 Am. B. R.
154, 96 Fed. Rep. 950.

IV.

Neither Blanchard nor Winn became a "workman," "clerk," "salesman" or "servant" because he also performed duties similar to those performed by his subordinates.

In Re Crown Point Brush Co., 29 Am. B. R.
638, 200 Fed. Rep. 882;
In Re Greenberger, 30 Am. B. R. 117, 203
Fed. Rep. 583.

V.

It is immaterial that neither Blanchard nor Winn was a stockholder or director of the bankrupt corporation.

In Re Crown Point Brush Co., 29 Am. B. R.
638, 200 Fed. Rep. 882.

VI.

The laws of the State of California giving priority to wages due workmen, clerks, servants, salesmen and "other persons" cannot avail Blanchard or Winn.

Code of Civil Procedure of the State of California, Section 1204;

Bankruptcy Act, Section 64 b (5);

In Re Riehl, 29 Am. B. R. 613, 200 Fed. Rep. 455;

In Re Jacob Slomka, 9 Am. B. R. 635, 122 Fed. Rep. 630;

In Re Rouse, Hazard & Co., 1 Am. B. R. 234, 91 Fed. 96.

Argument

I.

Blanchard and Winn are excluded from Section 64 b (4) of the Bankruptcy Act because their compensation exceeded \$1500 per year.

It has been held that Section 64 b (4) of the Bankruptcy Act is limited by the provisions of Section 1, Subd. 27, of the same Act, which latter section provides as follows:

“Wage-earner. Wage-earner shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one thousand five hundred dollars per year.”

In other words, the claimant to priority must receive a compensation not exceeding \$1500 per year in order to come within Section 64 b (4).

In the case in re Rose, 1 Am. B. R. 68, where these two sections of the Bankruptcy Act were discussed, the court said, at page 73:

"It is a well-recognized rule of the courts, when called upon to construe a statute (Sec. 64 b (4), that the legislative intent should be ascertained, and in seeking for that intent we should give to the language of the statute its ordinary signification. Interpreting this act consistently with the intent of Congress as fairly implied from the language used, did De Witt, by virtue of his contract with Rose, stand towards Rose in the relation of workman, clerk, or servant? I am of the opinion he did not; when Congress incorporated these words into the act, the framers of the act had in mind 'wage-earners', a distinct class of persons, and they undertake to point out the class of persons they intended to protect; they are named in the act 'wage-earners.' Sec. 1, paragraph 27, declares that wage-earners shall mean an individual who works for wages, salary, or hire, at a compensation not exceeding one thousand five hundred dollars a year. In the act itself we find Congress fastening a limitation upon workmen, clerks, or servants. Only workmen, clerks, or servants, whose yearly compensation does not exceed one thousand five hundred dollars per year, fall within its protection, and further limiting the amount which shall be given priority, to a sum earned during the three months prior to the date of filing a petition in bankruptcy; thus showing it was manifestly the intent of Congress to permit priorities in favor

of employees wholly dependent upon their wages, salary, or hire for subsistence, exclusive of any aid from capital, and whose probable necessities arising from the nature of their employment justly entitled them to protection."

See also the case of *in re August Becker & Co.*, 31 Am. B. R. page 596, where the court said:

"The claim for priority is made under Section 64 b (4) of the Bankruptcy Act, which reads as follows:

"The claimant would have been entitled to a priority under this section to the extent of \$175.00, if it were not for the provisions of Section 1, Subd. 27, which reads as follows: . . .

"The first section of the Bankruptcy Act very clearly defines a 'wage-earner' as an individual who works for wages, salary or hire at a rate of compensation not exceeding \$1500, and the subdivision of Section 64 relied upon by the claimant, instead of extending the scope of the subdivision of Section 1, limits it by providing that the wages due to workmen, clerks and servants which have been earned within three months may be allowed as a priority 'not to exceed three hundred dollars to each claimant.' "

II.

Neither the general manager of a corporation, such as Blanchard, nor the superintendent of its service department, such as Winn, is entitled to priority.

In the case of *in re Crown Point Brush Co.* 29 Am. B. R. 638, 200 Fed. Rep. page 882, the court, at page 639 of 29 Am. B. R., and page 883 of 200 Fed. Rep. said:

“The duties of a ‘general manager’ . . . are to manage, control, direct, guide the business; see that it is carried on pursuant to the policy or directions of the board of directors . . . Wages due the general manager of a business or a corporation are not entitled to priority of payment . . . In a sense all employees of a corporation from president down, are ‘workmen’ or ‘servants.’ They work and they serve. The Century Dictionary thus defines ‘workman’:

“(1). A man who is employed in manual labor, whether skilled or unskilled; a worker; a toiler; specifically an artificer, mechanic or artisan; a handcraftsman. (2). In general, one who works in any department of physical or mental labor; specifically a worker considered with special reference to his manner of or skill in work—that is, workmanship.

“And it defines ‘servant’ as:

"One who serves or attends, whether voluntarily or involuntarily; a person employed by another and subject to his orders; one who exerts himself or herself, or labors, for the benefit of a master or an employer; an attendant; a subordinate assistant; an agent.'

"The general manager in a sense works, and he works 'in a department of both physical and mental labor.' But this is not the meaning to be given to 'workmen' or 'servants' as used in the Bankruptcy Act, Section 64, Subd. 4."

and also on page 647 of 29 Am. B. R., and page 889 of 200 Fed. Rep.:

"Officers of corporations are in no sense workmen."

In Re Grubbs-Wiley Co. (D. C. Mo.) 2 Am. B. R. 442; 96 Fed. 183;

In Re Carolina Cooperage Co. (D. C. N. C.) 3 Am. B. R. 154, 96 Fed. 950;

This, of course, applies to the general manager and assistant general manager; and their salaries as such could not be entitled to priority.

See also the case of in re Albert O. Brown & Co., 22 Am. B. R. 496, 171 Fed. 281, where priority was denied to the manager in charge of the Chicago branch of a bankrupt New York stock broker's office. In this case the court, at page 497 of 22 Am. B. R., and page 281 of 171 Fed. Rep., said:

"It is quite clear that Olmstead is not a 'workman' for the bankrupt. Nor is he a 'ser-

vant,’ because the term does not include all instances of the formal relation of master and servant . . . In the more limited sense, it is quite clear that Olmstead is not a ‘servant.’

“The only thing left that he could be, therefore, is a ‘clerk.’ No one would think of calling the manager in charge of the Chicago branch of a broker’s office a ‘clerk’—he himself least of all.”

See also the case of *in re Greenberger*, 30 Am. B. R. 117, 203 Fed. Rep. page 583, where priority was denied to the general manager of a branch store.

See also the case of *in re Zotti*, 23 Am. B. R. 607, referred to and quoted at length on page 15 of this brief.

III.

Neither Blanchard nor Winn was a “servant” within the meaning of Section 64 b (4).

The bankruptcy act of 1867 provided that priority should not be given except that “wages due from him (the bankrupt) to any operative, or clerk, or house servant” shall be preferred. The present act uses the words: “workman,” “clerk,” “traveling or city salesman,” “servant.”

In the case of *in re Albert O. Brown & Co.*, 22 Am. B. R. 496, 171 Fed. Rep. 281, it was held at page 497 of 22 Am. B. R. and page 281 of 171 Fed. Rep.:

“‘Workman’ is possibly a wider phrase than ‘operative,’ and ‘servant’ is undoubtedly wider than ‘house servant,’ but the section is obviously copied after the law of 1867.”

In the following cases the word “servant” as used in the Bankruptcy Act of 1898 is not given a meaning as broad as the common law definition of the word. In them it is held that the words “workman,” “clerk” and “servant” are to be given a common every-day popular meaning, and this does not include high-salaried employees of a corporation, such as general managers, superintendents, etc.

In Re Smith, 11 Am. B. R. 646;
Grubbs-Wiley Grocery Co., 2 Am. B. R. 442,
96 Fed. Rep. 183;
In Re Carolina Cooperage Co., 3 Am. B. R.
154, 96 Fed. Rep. 950.

In the case of *in re Zotti*, 23 Am. B. R. 607, one Setchanow claimed priority for services performed as editor of a newspaper. These services were to take charge of the paper and write all of the reading matter. The owner of the paper, however, was at liberty to give him any orders he pleased, and everything that the editor was to do he was to consult the owner about it, and the owner directed the editor what to do in every particular. The court, at page 608, said:

“This is practically all of the testimony upon which the claimant seeks priority of pay-

ment in this proceeding under the Act (Section 64 b (4)), as for wages due workman, clerk or servant, and the question is: Does this claimant come within that class? He surely was not a workman or one performing manual labor; he was not a clerk, which relates rather to one in a subordinate position in some office, store, etc., and if he is to succeed he must come within the term 'servant.'

Now this term is a very comprehensive one. In a certain sense all public officers are servants. The officers of every corporation are but the servants of the directors, but no one would consider them for that reason entitled to priority. The term 'servant' is popularly applied to those who are employed in household duties or those of a like nature, yet, of course, it is equally used relating to persons under employment in almost every capacity, as suggested above. The true test, in a case such as the one presented here must be found in considering and determining the nature and character of the duties performed by the claimant.

There are many cases in the reports which deal with various named employments, but the position of editor is not among them. The services performed by the editor of the newspaper are necessarily of a much higher class than those performed by other persons employed in the newspaper offices, such as the compositor, or a pressman, or a proofreader. The editor uses

his head, his brains, and necessarily must to some extent use great discretion as to the matter which is to appear in the newspaper.

While undoubtedly the policies of the newspaper are directed by the owner or the manager, yet the editor must have some amount of discretion—in other words, to some extent, at least he is his own master. See *First Natl. Bank vs. Barnum*, 20 Am. B. R. 439.

While undoubtedly as between the editor and the manager, the relation of master and servant to some extent exists, it is not that kind of a relation, which I believe the Congress had in mind when it passed the Act allowing priorities to certain classes of individuals."

The analogy between the editor of a newspaper, such as the Setchanow above referred to, and the general manager of a corporation, or the superintendent of its service department, like Blanchard and Winn, is quite patent.

IV.

Neither Blanchard nor Winn became a "workman," "clerk," "salesman" or "servant" because he also performed duties similar to those performed by his subordinates.

The mere fact that Blanchard sold goods does not make him a salesman, nor does the fact that Winn worked with the men make him a workman, within

the meaning of the Bankruptcy Act. Their character should be determined by what they were employed to do. Blanchard was employed as a general manager and not as a salesman, and Winn was employed as superintendent of the service department and not as a workman in that department, and each was to receive his salary accordingly. As was said in the case of *in re Crown Point Brush Company*, 29 Am. B. R. 638, 200 Fed. Rep. page 882, at page 639 of 29 Am. B. R. and page 883 of 200 Fed. Rep.:

“Clearly the president and general manager of a corporation is not a clerk, or a traveling or city salesman, even though he may incidentally and occasionally do some clerical work and perform some clerical duties and make some sales. The same may be said of the treasurer and assistant general manager of a corporation, even though the treasurer keeps his own books and makes his own entries. The duties of a ‘general manager’ and of an ‘assistant general manager’ are to manage, control, direct, and guide the business; see that it is carried on pursuant to the policies of the corporation and the board of directors. If it should appear that a corporation employs a clerk to do or perform clerical duties at a fixed compensation or salary, and also empowers him to exercise certain powers of direction, supervision or control and management, without added or extra compensation, he would be a clerk, within the meaning

of the law, and his claim for salary would be entitled to priority; but should it employ him as clerk to perform clerical duties and set him to perform the duties of general or assistant general manager, and have the clerical duties performed by others, he would not be a clerk and his wages would not be due to a clerk, but to a general manager, or to an assistant general manager, as the case should be. The law would not tolerate an evasion of that kind . . . On the other hand, should a corporation employ a person to act as, and perform the duties of a general manager, or assistant general manager at a fixed salary, and finding such services unnecessary set him to perform the duties of clerk, floor sweeper, or furnace tender, he would be, in fact, either a workman or a servant, within the meaning of the law, and his claim for salary so earned would be entitled to priority. He would have the right to accept the inferior employment and perform its duties, but should he voluntarily, while holding the position of assistant general manager perform manual labor assigned as part of his duties, he would not become a workman or servant and entitled to priority. *His character would be determined by what he was employed to do . . .* The treasurer of a corporation is supposed to keep books; and it is his duty to do so. A corporation may employ a clerk, or clerks, to assist and do the mere clerical

cal work, but if it does not, and the treasurer himself makes the entries, keeps the books and does the necessary clerical work, he does not cease to be treasurer and become a workman or a clerk, or a servant, within the meaning of the bankruptcy law. . . . While in a sense each claimant here was an ‘employee’ of the bankrupt corporation, neither was an ‘employee’ within the further definition of the state, as neither was a mechanic, workman, or laborer, as those words are commonly understood. One was the president and general manager and the other the treasurer and assistant general manager, and each had a salary as manager and assistant manager respectively. Both, prior to bankruptcy, would have repudiated the idea that they were either workmen or laborers in the employment of the corporation, and as such, subject to their own order and direction as general manager and assistant general manager respectively, in which capacity, and that alone, they were employed and to be paid by the corporation.”

Blanchard corresponds to the general manager referred to in the above case and Winn to the treasurer and assistant general manager, and the analogy between the parties is too plain to require comment.

In the case of *in re Greenberger*, 30 Am. B. R. 117, 203 Fed. Rep. 583, the court, at page 118 of 30 Am. B. R. and page 584 of 203 Fed. Rep. said:

“Cohen was neither a workman, clerk, traveling or city salesman, or servant. The fact that as incident to the performance of his duties as general manager of this store, he kept it clean and did some clerical duties does not change the character of his employment. He was not employed to do that work, but to manage the business, and he was paid for managing it, and not for performing such menial services as he did perform as incident to the management. The claim is for salary and for salary as manager, not for services as a clerk and general workman and compensation as such.

The referee was right in holding that the claim of Cohen could not be allowed as one entitled to priority. It would hardly do to hold that the general manager of the business of a corporation, or individual, employed and paid as such, becomes entitled to priority, for the reason he incidentally sweeps the floor, dusts the counters, and assists in selling goods. Adopt this rule and general managers of a business would be sure to do enough menial work to bring themselves within the section of the bankruptcy act giving priority to workmen, clerks, salesman and servant.”

It is immaterial that neither Blanchard nor Winn was a stockholder or director of the bankrupt corporation.

It is apparent from the referee's certificate on review that the strongest consideration moving him to allow these claims as priority was the fact that neither Blanchard nor Winn were stockholders or directors of the bankrupt corporation. In other words, he favored them because they were in no measure responsible for the policies of the bankrupt or for the contraction of its debts and were subject at all times to the control of the board of directors of the corporation. While it is true that it appears in some of the cases that we have relied upon that the claimant was also a stockholder or director of the bankrupt corporation, still in none of these cases does it appear that priority was denied because the claimant was a stockholder or director, and in all of the cases it appears that priority was denied to general managers, superintendents and the like, even though they were subject to the control of a higher power, such as a board of directors, and they had no voice in the policies of the bankrupt.

As was said in the case of *in re Crown Point Brush Co.*, 29 Am. B. R. 638, 200 Fed. Rep. page 882, at page 639 of 29 Am. B. R. and page 883 of 200 Fed. Rep.

“The duties of a ‘general manager’ and of an ‘assistant general manager’ are to manage, control, direct, guide the business; *see that it is carried on pursuant to the policies of the board of directors,*”

and in that case priority was denied to a general manager and an assistant general manager.

See also the case of *in re Zotti*, 23 Am. B. R. 607, referred to and quoted at length on page 15 of this brief.

VI.

The laws of the State of California giving priority to wages due workmen, clerks, servants, salesmen and “other persons” cannot avail Blanchard or Winn.

Section 1204 of the Code of Civil Procedure of the State of California provides:

“Preferred Creditors When Assignment of Property Is Made. When an assignment, whether voluntary or involuntary, is made for the benefit of the creditors of the assignor, or results from any proceeding in insolvency commenced against him, the wages and salary of miners, mechanics, salesmen, servants, clerks, laborers, and other persons for services rendered for him within sixty days prior to such assignment, or to the commencement of such proceeding, and not exceeding \$100 each, con-

stitute preferred claims, and must be paid by the trustee or assignee before the claim of any other creditor of the assignor or insolvent."

Section 64 b (5) of the Bankruptcy Act provides:

"The debts to have priority . . . and to be paid in full out of the bankrupt's estate, and the order of payment shall be . . . debts owing to any person who by the laws of the States or the United States is entitled to priority."

Blanchard and Winn contended at the hearing before the District Judge that, even though they did not come within Section 64 b (4) of the Bankruptcy Act, they were entitled to the benefits of the said section of the Code of Civil Procedure of the State of California because of the wording of the said Section 64 b (5) of the Bankruptcy Act.

This contention is not a new one and has been raised many times before but decided adversely. The great weight of authority is to the effect that Section 64 b (5) does not enlarge Section 64 b (4), and that where the two sections come in conflict Section 64 b (4) controls. In other words, workmen, clerks, and servants obtain only such priority as is definitely fixed by Section 64 b (4), and, if they do not come within its provision, they cannot take refuge in Section 64 b (5).

In the case of *in re Riehl*, 29 Am. B. R. 613, 200 Fed. 455, the court said at page 615 of 29 Am. B. R., and page 456 of 200 Fed. Rep.:

“Section 64, paragraph 5, clause 5, of the Bankruptcy Act, gives precedence over claims of general creditors to debts owing to any person who by the laws of the States or the United States, is entitled to priority. Ordinarily a court of bankruptcy will recognize and enforce such priority as may be given by the State law. The exceptions are those cases in which the bankruptcy act itself fixes the nature and extent of the preference to which a particular creditor or a particular class of creditors shall be entitled. For example, it says that the wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed \$300 to each claimant, shall be preferred, and that partnership property shall be first applied to partnership debts and individual property to individual debts. When Congress has thus spoken, its will prevails over all State statutes.”

In the case of *in re Jacob Slomka*, referred to in *in re Riehl*, the court said at page 637 of 9 Am. B. R., and page 631 of 122 Fed. Rep.:

“If by the State law the debts were within the general description of clause 5, we are of opinion that the clause would not apply and

that the terms of clause 4 supply the exclusive rule for determining what debts for wages are entitled to priority. No principle of statutory construction is better settled than that which displaces the application of general provisions to a particular subject when there are specific provisions applicable to it in the same act. The subject of claims for wages is specifically regulated by clause 4, and its provisions express the particular intent of Congress regarding priority of such claims. As these confine the priority to wages earned within the three months before the commencement of the bankruptcy proceedings, debts like the present are not included. We agree upon this question with the decision of the Circuit Court of Appeals for the Seventh Circuit, *in re Rouse, Hazard & Co.*, 1 Am. B. R. 234, 91 Fed. Rep. 96, and for the reasons which are so satisfactorily stated in the opinion in that case. We have given due consideration to the decision by the Circuit Court of Appeals for the Sixth Circuit, *in re Laird*, 6 Am. B. R. 1, 109 Fed. Rep. 550, but we are unable to regard it as correct."

In the case of *in re Rouse, Hazard & Co.*, 1 Am. B. R. 234, 91 Fed. 96, the court, at page 240 of 1 Am. B. R. and page 99 of 91 Fed. Rep. said:

"The question here is one of construction of the Bankrupt Law of the United States, and

is this: Whether Congress, having spoken by a particular provision—Sec. 64 b (4)—with respect to the priority to be allowed labor claimants, and having subsequently in the act—Sec. 64 b (5)—spoken generally with respect to recognition of the priorities allowed by the laws of the State, or the United States, the latter general provision overrides or enlarges the prior special provision.

“The Bankrupt Act by its terms went into full force and effect upon its passage July 1, 1898, and notwithstanding the provision that no voluntary petition should be filed within one month of the passage of the act, and that no petition for involuntary bankruptcy should be filed within four months of the passage of the act, the Bankrupt Law was operative from the date of its passage, and was effective from that date to supersede the insolvency laws of the several States. *Parmenter Manufacturing Company vs. Hamilton*, 51 N. E. Rep. 529; *Blake Moffitt & Towne vs. Francis-Valentine Company*, 89 Fed. R. 691; In re Bruss-Ritter Company, Eastern District of Wisconsin, 90 Fed. R. 651. It is probably true that Congress could constitutionally in the Bankrupt Act recognize the varying systems of the several States with respect to exemptions and with respect to priority of payment of debts. *Darling vs. Berry*, 4 McCrary, 407. So that the question recurs, what was the real intention of the Con-

gress as expressed in Subd. 4 and 5 of Sec. 64 b? In the first subdivision Congress addresses itself to the subject of labor claims, and particularly provides that all wages that have been earned within three months before the date of the commencement of proceedings in bankruptcy, not to exceed \$300 to each claimant, shall be awarded priority of payment. It recognized, it must be assumed, the various provisions of law in the several States with respect to the subject. It found them not to be in harmony, and in some States, as notably Illinois, the laws upon that subject not to be consistent with each other. It found limitation as to time different in the different States. It found that in some of the States priority of payment was unlimited as to amount, and in some of the States limited to so small a sum as \$50. With this divergence within its knowledge, the Congress spoke to the subject specially and particularly, and limited the amount to \$300, and, as to time, to wages earned within three months before the commencement of proceedings. Can, then, the subsequent provision of the law following immediately thereafter allowing priority of payment for all debts owing to any person who, by the laws of the States or the United States, is entitled to priority, be held to enlarge the prior provision so that the statute should be read that in any event the laborer should be entitled to priority

of payment in respect of wages earned within three months prior to proceedings and in amount not exceeding \$300, and that wherever the laws of the State of the residence of the bankrupt grant the laborer priority of payment without limit as to time or amount, or imposes a limit in excess of that imposed by the Bankrupt Act, he shall be entitled to a further priority in payment according to the law of the particular State? We think not. It is not to be supposed—unless the language of the act clearly so speaks—that the Congress intended that in the administration of the act there should be a marked contrariety in the priority of payment of labor claims dependent upon locality. It is an elementary principle of construction that where there are in one act, or in several acts contemporaneously passed, specific provisions relating to a particular subject, they will govern in respect to that subject as against general provisions contained in the same act. Sutherland on Statutory Construction, Sec. 158.”

Conclusion

In conclusion we respectfully submit that we have established the following propositions:

- (1) Neither Blanchard nor Winn is entitled to priority of payment under Section 64b (4) of the Bankruptcy Act because their compensation exceeded \$1500.00 per year, the limit fixed by Section 1, Subd. 27 of the Bankruptcy Act;
- (2) The great weight of authority is to the effect that neither the general manager of a corporation, such as Blanchard, nor the superintendent of its service department, such as Winn, is entitled to priority of payment under Section 64b (4);
- (3) The laws of the State of California cannot avail Blanchard or Winn in obtaining priority of payment.

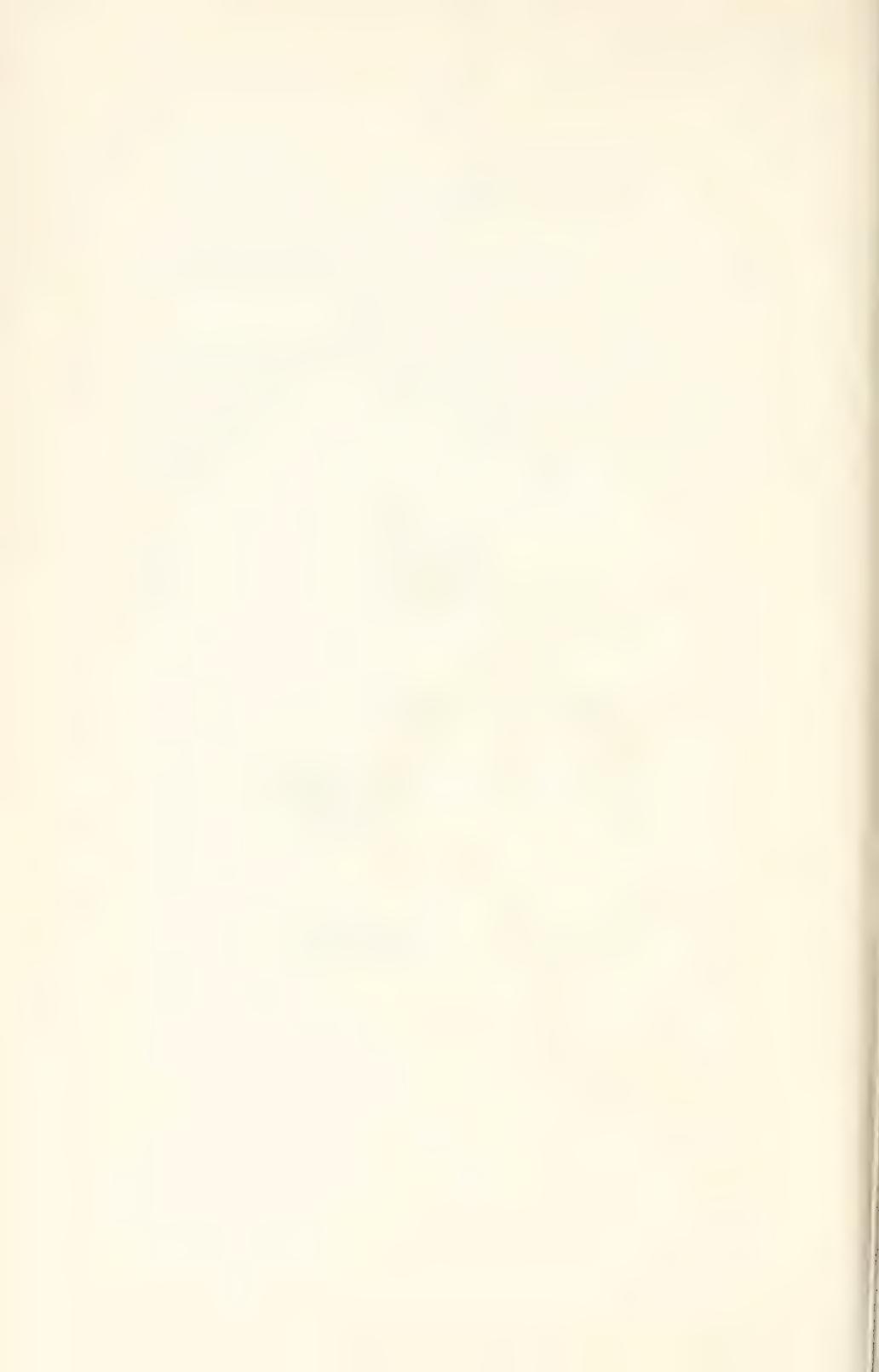
We urge that the order of the District Court should be reversed, with costs to the petitioner and against the respondents.

Dated, San Francisco, February....., 1915.

Respectfully submitted,

HELLER, POWERS & EHRLMAN,
REUBEN G. HUNT,

Attorneys for Petitioner.



IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHAS. B. BLESSING, as Trustee of the Estate
of Pacific Motor Car Company (a cor-
poration), Bankrupt,

Petitioner,

vs.

G. A. BLANCHARD and W. H. WINN,

*Respondents.***BRIEF FOR RESPONDENTS.**

R. H. COUNTRYMAN,
Attorney for Respondents.

Filed this day of March, 1915.

Filed*FRANK D. MONCKTON, Clerk.*

By Deputy Clerk.

F. D. Monckton,

No. 2530

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vs.

G. A. BLANCHARD and W. H. WINN,
Respondents.

BRIEF FOR RESPONDENTS.

Statement of the Case.

The bankrupt, Pacific Motor Car Company, was a California corporation engaged in distributing, for a commission, the "Cole" car in local territory.

"The capital stock of this corporation is owned by one individual" (p. 9 Petition for Revision). The bankrupt had the usual salesmen and a service shop. Respondent Blanchard was a city salesman for said bankrupt. The corporation was in financial trouble, and Blanchard, about three months before the petition in bankruptcy was filed, was given the position of general manager, but he continued to work "in the capacity of a salesman" (page 7 of said Petition).

He "was subject to the control in all things" of the sole owner of the capital stock of the bankrupt (page 9 of said Petition).

"He (Blanchard) had no voice in the policies of the company, not being a stockholder, officer or director thereof" (page 9 of said Petition).

He had no "financial or controlling interest in the business, he being only a salaried employee" (page 10 of said Petition).

"He was not an officer, director or stockholder of the bankrupt and received no compensation other than a salary" (page 7 of said Petition).

Respondent Winn "performed labor about the shop in like manner as the men working under him in the repair of automobiles and general shop work" (page 7 of said Petition).

"As to Winn, while he had charge of the workmen in his department, he worked along with them, performing manual labor as a mechanic" (page 11 of said Petition).

Brief of the Argument.

I.

SECTION 1 (27) OF THE BANKRUPTCY ACT DEFINING A WAGE-EARNER DOES NOT LIMIT OR CONTROL SECTION 64-b (4) OF SAID BANKRUPTCY ACT.

Remington on Bankruptcy, page 1338, Sec. 2171;

In re Scanlon Co., 3 A. B. R. 202;

In re Carolina Cooperage Co., 3 A. B. R. 154;
 In re Gurewitz, 10 A. B. R. 350;
 In re Smith, 11 A. B. R. 647;
 First Nat. Bk. of Wilkes Barre v. Barnum,
 20 A. B. R. 439;

In re Swain Co., 28 A. B. R. 66.

Words + Phrases *Title "Salary"*
Words + Phrases *Title "Wages"*
Whit. & Hayden II. 126 Cal. 627.

BLANCHARD AND WINN WERE BOTH WORKMEN AND
 SERVANTS.

Robuck Weather Strip & Wire Screen Co.,
 24 A. B. R. 532;
 In re Swain Co., 28 A. B. R. 66;
 In re Roberts, 27 A. B. R. 437;
 In re Coldwell, 21 A. B. R. 236;
 Bell v. Arledge, 27 A. B. R. 773;
 In re Baumblatt, 19 A. B. R. 500;
 In re Fink, 20 A. B. R. 897;
 Am. & Eng. Ency. of Law, 2nd ed., p. 11;

Collier on Bankruptcy, 7th ed. 740.

Black on Bankruptcy sees 105, 495, 626, 627, 628.
Ellis on Bankruptcy 10th ed. p. 12, 18, 127, 40, 902.
Washington on Bankruptcy sees 30, 46, 47, 101½, 243.
 71 to 2183.

BLANCHARD WAS A CITY SALESMAN AND A CLERK.

Sec. 64-b (4) of the Bankruptcy Act, by an amendment approved June 15th, 1906 (Vol. 34 U. S. Sts. at Large 267; Vol. 3 Foster's Fed. Prac. p. 3027) was amended by inserting therein the words "travel-

ing or city salesman". The language of said section as amended reads as follows, viz.:

"Wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of commencement of proceedings, not to exceed \$300 to each claimant."

This amendment is a congressional declaration that the original section was being too narrowly construed by the judges of several districts.

In re New England Thread Co., 20 A. B. R.
47.

IV.

BLANCHARD AND WINN ARE ENTITLED TO PRIORITY UNDER THE LAW OF CALIFORNIA.

Sec. 1204 of the California Code of Civil Procedure reads as follows, viz:

"When an assignment, whether voluntary or involuntary, is made for the benefit of the creditors of the assignor, or results from any proceeding in insolvency commenced against him, the wages and salaries of miners, mechanics, salesmen, servants, clerks, laborers and other persons, for services rendered for him within sixty days prior to such assignment, or to the commencement of such proceeding, and not exceeding one hundred dollars each, constitute preferred claims, and must be paid by the trustee or assignee before the claim of any other creditor of the assignor or insolvent."

Sec. 1205 of the California Code of Civil Procedure reads as follows, viz:

"Upon the death of any employer, the wages, not exceeding one hundred dollars in amount, of each minor, mechanic, salesman, clerk, servant, laborer or other employee, for work done or services rendered within sixty days prior to such death, must be paid before any other claim against the estate of such employer, except his funeral expenses, and expenses of the last sickness, the allowance to the widow and infant children, and the charges and expenses of administration."

Sec. 1206 of the California Code of Civil Procedure reads as follows, viz:

"Upon the levy of any attachment or execution, not founded upon a claim for labor, any miner, mechanic, salesman, servant, clerk, laborer, or other person who has performed work or rendered services for the defendant within sixty days prior to the levy, may file a verified statement of his claim therefor with the officer executing the writ, and give copies thereof to the debtor and the creditor, and such claim, not exceeding one hundred dollars, unless disputed, must be paid by such officer from the proceeds of such levy remaining in his hands at the filing of such statement. If any claim is disputed, within the time, and in the manner prescribed in section twelve hundred and seven, the claimant must within ten days thereafter commence an action for the recovery of his demand, which action must be prosecuted with due diligence, or his claim to priority of payment is forever barred. The officer must retain in his possession until the determination of such action so much of the proceeds of the writ as may be necessary to satisfy the claim, and if the claimant recovers judgment, the officer must pay the same, including the costs of suit, from such proceeds."

Sec. 1207 of the California Code of Civil Procedure reads as follows, viz:

“Within five days after receiving a copy of the statement provided for in the preceding section, either the debtor or the creditor may file with the officer a verified statement denying that any part of such claim is due for services rendered within sixty days next preceding the levy of the writ, or denying that any part of such claim, beyond a sum specified, is so due. If a part of the claim is admitted to be due, and the claimant nevertheless brings suit and does not recover more than the amount so admitted, he cannot recover costs, but the costs must be adjudged against him, and the amount thereof deducted from the sum found due.”

Sec. 1208 of the California C. C. P. reads as follows, viz:

“If the claims presented under section twelve hundred and six and not disputed, or, if disputed, established by judgment, exceed the proceeds of the writ not disposed of before their presentation, such proceeds must be distributed among the claimants in proportion to the amount of their respective claims.”

Bankruptcy Act, 64-b (5);

In Swain Co., 28 A. B. R. 66;

Ludlow v. Pugh, 32 A. B. R. 435;

In re Keith-Gara Co., 29 A. B. R. 466;

In re Joel J. Gerson, 1 A. B. R. 251;

In re Rouse, Hazard & Co., 1 A. B. R. 231;

(The case of In re Benj. L. Rouse, 1 A. B. R. 393, decides different propositions.)

In re Burton Bros. Mnfg. Co., 14 A. B. R. 218;

In re E. Wright, 2 A. B. R. 592;
In re Goldstein, 2 A. B. R. 603;
In re Fall City Co., 3 A. B. R. 437;
In re Lewis, 4 A. B. R. 51;
In re Lawlor, 6 A. B. R. 184;
In re William V. Crow, 7 A. B. R. 545;
In re Jones, 18 A. B. R. 206;
In re Standard Oak Veneer Co., 22 A. B. R.
883;
In re Mercer, 22 A. B. R. 413;
In re Amoratis, 24 A. B. R. 565;
In re Chandron & Peyton, 24 A. B. R. 811;
In re Yoke Vitrified Brick Co., 25 A. B. R.
18;
In re McDavid Lumber Co., 27 A. B. R. 39;
In re Tilden, 91 Fed. 500;
In re Camp, 91 Fed. 745;
In re Byrne, 97 Fed. 762;
Bank of Visalia v. Dillonwood Co., 148
Cal. 18.

Argument.

**BLANCHARD AND WINN ARE NOT EXCLUDED FROM SEC. 64-b
(4) OF THE BANKRUPTCY ACT BECAUSE THEIR COMPEN-
SATION EXCEEDED THE SUM OF \$1500 PER YEAR.**

In his report herein the referee said:

“There is some authority in support of the contention that where the wages exceed \$1500 a year, priority cannot be granted. In re Rose, 1 A. B. R. 73, and the recent case of In re

Becker & Company, opinion by the referee, 31 A. B. R. 596.

"The decided weight of authority, however, is that the provisions of section 1 (27) have reference to those who may be proceeded against in an involuntary proceeding, and is not controlling upon the question as to who is entitled to priority."

The weight of authority is clearly sustained by the well established rules of statutory construction. Section 1 (5) defines the word "clerk" as meaning the clerk of a Court of bankruptcy. If the narrow construction contended for by the petitioner is adopted, the word "clerk" in Section 64-b (4) would have to be confined to clerks of a Court of bankruptcy. Palpably such a construction would be unreasonable, and in clear violation of the purpose of Congress to grant priorities. Section 64~~b~~ is headed "debts which have priority". It is subdivided and sectionized. The amendment of Section 64-b (4) of June 15th, 1906, shows the intention of Congress to enlarge the scope of the section, and not to restrict it, or to limit its operation. Because an individual who works for wages, salary or hire at a compensation not exceeding \$1500 per year may not be adjudged an involuntary bankrupt, is no reason why each such wage-earner should not be entitled to compensation earned by him if his earnings are in excess of \$1500 per year. In one section Congress declares its policy to be ~~such~~ that an individual who is unable to earn a sum in excess of \$1500 a year shall not be proceeded against as an

involuntary bankrupt. In the other section, it announces its policy that each workman, clerk, traveling or city salesman, or servant, shall be entitled to the sum of \$300 as a priority, if that sum of money shall have been earned by him within three months before the date of the commencement of proceedings in bankruptcy. There is no limit as to the yearly compensation that such prior claimant shall have been paid, but there is a limit that he shall not have priority for any unpaid amount in excess of the sum of \$300. This priority rule is along the line of homestead and exemption laws, it being universally conceded that it is for the best interests of organized society that persons who depend on their labor for their living expenses should not be pauperized, and to protect subordinate helpers and assistants and those dependent upon their wages as a means of livelihood.

II.

NEITHER BLANCHARD NOR WINN WAS ANYTHING MORE THAN AN ORDINARY EMPLOYEE OF THE BANKRUPT.

Blanchard acted as a salesman of the bankrupt. He was not a stockholder of the corporation. He was not a director or officer. He was the first employe to be discharged. He was hired and discharged the same as any other employe. While designated as general manager, it is apparent that in a small corporation engaged in retailing motor

cars in a limited territory, the title of general manager was mouth-filling in sound rather than in substance; the bankrupt apparently tried to cover its shortage in commissary by a lengthening of titles.

Winn is clearly a workman. He wore overalls and a jumper and performed manual mechanical labor the same as any other workman in the service shop. Duty and not nomenclature is the real test to be applied. The bankrupt was one man doing business under a corporate name. As a matter of convenience for the one stockholder, the business was conducted under the familiar and convenient form of corporate entity. The Court should look through the mere form to the end that the priority contemplated by the statute should be enforced. It is quite a common thing for close corporations to elect clerks and subordinates to directorship and to give them official titles, but it is the experience of all who transact business with such close corporations that the importance of the clerk or subordinate is not raised, nor is his salary increased, because he fills the position of a director, or is designated as an officer of such close corporation. When the owners of the capital stock of the corporation, whether one or more, become dissatisfied with the clerk or subordinate he is discharged as unceremoniously as he would have been if he never had been a dummy director or held an empty title.

In re Swain Co. v. 28 A. B. R. 66, the opinion was written by Mr. District Judge De Haven. The head-note reads:

"The claim made by one who acted as director and secretary of the bankrupt restaurant corporation, but who was really a 'dummy' officer, for wages for services rendered as steward of bankrupt's restaurant, and in no other capacity, is entitled to priority of payment under Section 64-b of the Bankruptcy Act."

In re Roberts, 27 A. B. R. 437, the claimant was a bookkeeper. While occupying the duties of a bookkeeper the claimant was elected as a director and treasurer of the bankrupt corporation. U. S. District Judge Willard held that the claimant was entitled to a preference for her monthly salary, saying:

"The fact that a claimant is a director or officer of a corporation does not disable the corporation from employing him as a clerk also."

In re Pilger 118 Fed. 206.

PRIORITY GIVEN BY THE LAWS OF CALIFORNIA.

This matter is so well settled that it would be a work of supererogation to further consider it. Among the authorities we have cited is In re Amoratis, 24 A. B. R. 565, in which Mr. Circuit Judge Ross of this district wrote the opinion.

Dated, San Francisco,
March 6, 1915.

Respectfully submitted,

R. H. COUNTRYMAN,
Attorney for Respondents.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SADIE COTTER,

Plaintiff in Error,

vs.

FRANK J. COTTER,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Territory of Alaska, Third Division.

Filed

JAN 14 1915

F. D. Monckton,
Clark.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SADIE COTTER,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

*In the District Court for the Territory of Alaska,
Third Division.*

Messrs. LYONS & ORTON, 1102-1105 Alaska Bldg.,
Seattle, Washington,

Messrs. LYONS & RITCHIE, Valdez, Alaska,
Attorneys for the Plaintiff and Plaintiff in
Error.

Mr. S. O. MORFORD, Seward, Alaska,
Attorneys for the Defendant and Defendant in
Error. [2*]

*In the District Court for the Territory of Alaska,
Third Division, at Valdez.*

No. 684.

SADIE COTTER,
Plaintiff,

vs.

FRANK J. COTTER,
Defendant.

Complaint.

The plaintiff complains of the defendant and for
her cause of action against him alleges:

I.

That at all times hereinafter mentioned the Superior Court of the State of Washington, for the County of King, was a court of general jurisdiction over matters in equity and law, duly created and

*Page-number appearing at foot of page of original certified Record.

organized by the laws of that State.

II.

That on the 27th day of January, 1913, the plaintiff commenced an action for divorce in said court against the defendant; that said defendant was duly served with process therein and on the 8th day of May, 1913, appeared in said action and submitted himself personally to the jurisdiction of the Court.

III.

That thereafter, and on the 14th day of May, 1913, such proceedings were had in said court and cause whereby a decree was duly given, made, entered, enrolled and docketed in said court in favor of the plaintiff, dissolving the bonds of matrimony which existed between the plaintiff and defendant.

IV.

That said decree further provided and ordered that the defendant pay to the plaintiff, as permanent alimony, the sum of Fifty Dollars (\$50.00) per month, the same to be paid on the 1st day of each and every month from the date of the entry of said decree.

[3]

V.

That said decree further provided that the defendant should pay certain outstanding indebtedness incurred by the plaintiff in the sum of Seven Hundred Fifty Dollars; that no part of same has been paid except the sum of One Hundred Twenty Dollars (\$120.00), and there is now due and owing from the defendant to the plaintiff the sum of Six Hundred Thirty Dollars (\$630.00), together with interest thereon at the rate of eight per cent (8%) per annum

from date until paid.

VI.

That the defendant has not paid said alimony or any part thereof, and there is now due and owing on account of the same, from the defendant to the plaintiff, the full sum of Six Hundred Fifty Dollars (\$650.00), together with interest thereon at the rate of eight per cent (8%) per annum from date until paid.

VII.

That the plaintiff has no property and is wholly dependent upon her own labor for her support, and much of the time since said decree was rendered she has been unable to procure employment, and has had much trouble in procuring the ordinary necessities of life.

VIII.

That no appeal has been taken by the defendant from the entry or provision of said decree, nor has the same been set aside or modified in any way and such decree and the whole thereof is now in full force and effect.

IX.

That said Superior Court for King County, in the State of Washington, is duly empowered and authorized under the laws of said State to grant permanent alimony, as provided by said decree,—a copy of the Statutes of the State of Washington relative thereto being as follows. and hereby made a part of this complaint:

“In granting a divorce, the Court shall also make such disposition of the property of the

parties as shall appear just and equitable, having regard to the relative merits of the parties and to the condition in which they shall be left by such divorce, and to the burdens imposed upon it for the benefit of the [1] children, and shall make provision for the guardianship, custody, support and education of the children of such minor marriage."

WHEREFORE, the plaintiff prays for judgment:

First: For the sum of Twelve Hundred Eighty Dollars (\$1280.00), together with interest thereon at the rate of eight per cent (8%) per annum from date until paid.

Second: That the defendant may be required to pay a reasonable sum of money into the Court to defray the expenses of this action and for counsel fees, and for such other and further relief as to the Court may seem just and proper in the premises, and for her costs and disbursements in this action.

JOHN LYONS and
E. E. RITCHIE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

I, John Lyons, being first duly sworn, depose and say: That I am one of the attorneys for the plaintiff in the foregoing action; that I have read the foregoing complaint, know the contents thereof and the same is true as I verily believe; that the reason I make this verification is because the plaintiff is not now a resi-

dent of the Territory of Alaska, and is not now in said Territory.

JOHN LYONS.

Subscribed and sworn to before me this 12th day of August, A. D. 1914.

[Notarial Seal] ANTHONY J. DIMOND,
Notary Public for Alaska.

My commission expires Mar. 13, 1917.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Aug. 13, 1914. Arthur Lang, Clerk. By Chas. A. Hand, Deputy. [5]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

Demurrer.

Comes now the defendant in the above-entitled cause by his attorney, S. O. Morford, and demurs to the complaint on file herein, and for cause of demurrer states:

I.

That the Court has no jurisdiction of the subject matter of the action.

II.

That the plaintiff has no legal capacity to sue.

III.

That plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant.

S. O. MORFORD,

Attorney for Defendant.

Service accepted this 9th day of October, 1914.

LYONS & RITCHIE,

Attys. for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Oct. 9, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [6]

**[Order Sustaining Demurrer and Dismissing Cause,
etc.]**

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

ORDER ON DEMURRER.

This cause coming on regularly to be heard this 10th day of October, 1914, upon demurrer of defendant to complaint of plaintiff on file herein, plaintiff being represented by E. E. Ritchie, Esq., and defendant being represented by S. O. Morford, Esq., the Court, after hearing the arguments of respective

counsel, and being fully advised in the premises, hereby sustains defendant's demurrer as to all points therein raised, and does hereby order the dismissal of the action at plaintiff's costs, and the attachment herein issued dismissed, and the bondsmen exonerated.

Done in open court at Seward, this 16th day of October, A. D. 1914.

FRED M. BROWN,
Judge.

To which order plaintiff excepts and exception is allowed.

FRED M. BROWN,
Judge.

[Endorsed] : Filed in the District Court, Territory of Alaska, Third Division. Oct. 16, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 1, page No. 336. [7]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

Bill of Exceptions.

Be it remembered that on the 13th day of August, 1914, the plaintiff commenced her action against the defendant by filing her complaint, upon the filing of

which said complaint, to wit, on the said 13th day of August, 1914, summons was duly issued out of the above-entitled court, which summons was thereafter duly served upon the defendant. On the 9th day of October, 1914, the defendant appeared, and filed a demurrer to said complaint, upon the following grounds, to wit:

First: That the Court has no jurisdiction of the subject matter of the action.

Second: That the plaintiff has no legal capacity to sue.

Third: That plaintiff's complaint does not state facts sufficient to constitute a cause of action against the defendant.

On the 10th day of October, 1914, at the October, 1914, term of said court at Seward, Alaska, this cause came on to be heard upon defendant's demurrer to plaintiff's complaint. Said demurrer was argued by S. O. Morford, counsel for defendant, and by E. E. Ritchie, counsel for plaintiff, and the Court took the same under advisement. Thereafter, on the 16th day of October, 1914, the Court rendered its decision, and entered the following order sustaining the demurrer and dismissing the action. (Here insert copy of order.) To which said order plaintiff then and there duly excepted. And now comes the plaintiff by her attorneys, Lyons & Ritchie, and makes and files this her bill of exceptions, and have the same made a part of the record in the above-entitled cause.

I.

The plaintiff excepts to the order of the Court, sustaining the demurrer of defendant to the complaint

of plaintiff filed herein.

II.

The plaintiff excepts to the order and judgment of the Court [8] made and entered on the 16th day of October, 1914, dismissing said complaint and plaintiff's action, and awarding the costs of said action to the defendant.

Dated at Valdez, Alaska, this 21st day of October, 1914.

LYONS & RITCHIE,
Attorneys for Plaintiff.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 23, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [9]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

Order Allowing Bill of Exceptions.

And now, to wit, on the 23d day of November, 1914, the Court having had under consideration the settlement of the plaintiff's bill of exceptions, prepared in the above-entitled cause, and the same being in accord with the record in said cause:

IT IS NOW HEREBY ORDERED that the said exceptions, and each of them, are by the Court duly

allowed and settled, and such exceptions are hereby ordered filed and made a part of the record in said cause.

FRED M. BROWN,
District Judge.

[Endorsed] : Filed in the District Court, Territory of Alaska, Third Division. Nov. 23, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 436. [10]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

Petition for Writ of Error.

Comes now Sadie Cotter, the plaintiff in the above-entitled cause, and says:

That on the 16th day of October, 1914, the Court made and entered judgment in favor of the defendant, and against the plaintiff in the above-entitled action, dismissing the complaint filed in said cause, and for the costs of said action to be taxed. That in said judgment and the proceedings had thereto prior, certain errors were committed to the prejudice of the said plaintiff, all of which will more fully and in detail appear in the assignment of errors, which is filed with this petition.

Wherefore, plaintiff prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Dated at Valdez, Alaska, this 21st day of November, 1914.

LYONS & RITCHIE,
Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 23, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [11]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

Order Allowing Writ of Error.

On this 23d day of November, 1914, came the plaintiff herein by her attorneys, Lyons & Ritchie, and filed herein and presented to the Court her petition praying for the allowance of a Writ of Error, and the assignment of errors to be urged by them; praying also

that a transcript of the record and proceedings and papers, upon which the order and judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Now, therefore, in consideration of the premises, and the Court being fully advised:

It is ordered that the aforesaid Writ of Error be, and the same is hereby allowed, upon the said plaintiff giving bond, according to law, in the sum of Two Hundred Fifty Dollars, conditioned for the payment of any judgment that may be obtained by defendant, and any damages he may sustain by reason of said appeal, which said bond shall operate as a supersedeas bond. And it is further ordered that a transcript of the record, papers, files and proceedings in this cause, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Valdez, Alaska, this 23d day of November, 1914.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 23, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 436. [12]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

Assignment of Errors.

Now comes the plaintiff in the above-entitled cause, and plaintiff in error herein, and by her attorneys Lyons & Ritchie, makes and files the following assignment of errors, on which she will rely in the prosecution of her writ of error in the above-entitled cause:

I.

The Court erred in making and entering its order, on the 16th day of October, 1914, sustaining the demurrer of the defendant, to the complaint filed by the plaintiff on the 13th day of August, 1914, and in deciding that said complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff and against the defendant.

II.

The Court erred in making and rendering its order and judgment of the 16th day of October, 1914, wherein and whereby it is ordered and adjudged by the Court that plaintiff's complaint and action be dismissed upon the merits, and that defendant recover from said plaintiff his costs in said action.

For the reason that said judgment of dismissal is predicated upon the order of the Court made and entered on the 16th day of October, 1914, sustaining the general demurrer to plaintiff's complaint; and the Court erred in deciding that the plaintiff's complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant. And the plaintiff has elected to stand on said complaint. Whereas the said complaint does state a perfect cause of action. [13]

Wherefore, the appellant prays that the said order and judgment of the said District Court for the Territory of Alaska, Third Division, be reversed.

LYONS & RITCHIE,
Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 23, 1914.
Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[14]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

Order Fixing Amount of Bond on Writ of Error.

The plaintiff, Sadie Cotter, having this day filed her petition for a writ of error, from the decision and

judgment thereon made and entered herein, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made, fixing the amount of security which plaintiff should give and furnish upon said writ of error, and said petition having been allowed.

Now, therefore, it is ordered that upon the said plaintiff Sadie Cotter, filing with the clerk of this court, a good and sufficient bond, in the sum of Two Hundred and Fifty Dollars, to the effect that if the said plaintiff and plaintiff in error shall prosecute the said writ of error to effect, and answer all damages and costs, if she fails to make her plea good, then the said obligation to be void; else to remain in full force and virtue, the said bond to be approved by the Court, and that all further proceedings in this court be, and they are hereby suspended and stayed until the determination of said writ of error, by the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 23 day of November, 1914.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 23, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 435. [15]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

Bond on Writ of Error.

Know all men by these presents, that I, Sadie Cotter, as principal, and Samuel Blum and J. M. Lathrop, as sureties, are held and firmly bound unto Frank J. Cotter, the defendant in error, in the full and just sum of Two Hundred Fifty, to be paid to the said Frank J. Cotter, his heirs, executors, administrators, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 23d day of November, 1914.

Whereas, lately in the District Court for the Territory of Alaska, in the Third Division thereof, in an action pending in said court between Sadie Cotter, plaintiff, and Frank J. Cotter, defendant, a judgment was rendered against the said Sadie Cotter; and the said Sadie Cotter having obtained a writ of error, and filed a copy thereof in the Clerk's office of the said court, to reverse the judgment in the aforesaid suit; and a citation directed to the said

Frank J. Cotter, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals, for the Ninth Judicial Circuit, to be holden at the City and County of San Francisco, in the State of California, in said circuit, on or after the 22d day of November, 1914.

Now the condition of the above obligation is such, that if the said Sadie Cotter shall prosecute said writ of error to effect and answer all damages and costs that may be awarded against her, if she fails to make said appeal good, then this obligation to be void, otherwise to remain in full force and virtue.

SADIE COTTER,

By JOHN LYONS,

Her Agent. [16]

SAMUEL BLUM,

Surety.

J. M. LATHROP,

Surety.

Signed, sealed and delivered in the presence of

E. E. RITCHIE.

T. P. GERAGHTY.

Approved by

FRED M. BROWN,

District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 23, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

[17]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

Writ of Error [Original].

The President of the United States of America, to
the Honorable FRED M. BROWN, Judge of
the District Court, for the Territory of Alaska,
Third Judicial Division, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court, before you, or some of you,
between Sadie Cotter, plaintiff in error, and Frank
J. Cotter, defendant in error, manifest error hath
happened to the great damage of the said Sadie
Cotter, plaintiff in error, as is stated and appears
manifest and apparent in and by her petition herein.

We, being willing that error, if any hath been,
should be duly corrected, and full and speedy justice
done to the party aforesaid in this behalf, do com-
mand you, if judgment be therein given, that then
under your seal, distinctly and openly, you send the
record and proceedings aforesaid, with all things con-
cerning the same, to the Justices of the United States
Circuit Court of Appeals for the Ninth Circuit, in
the city of San Francisco, in the State of California,

together with this writ, so as to have the same at the city of San Francisco, in the State of California, on the 22d day of December, 1914, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States and of the Territory of Alaska should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 23d day of November, A. D. 1914. [18]

Attest my hand and the seal of the District Court for the Territory of Alaska, Third Division, in the Clerk's office at Valdez, Alaska, on the day and year last above written.

[Seal] ARTHUR LANG,
Clerk of the District Court for the Territory of
Alaska, Third Division.

By T. P. Geraghty,
Deputy.

Writ of Error allowed this 23d day of November, 1914.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 23, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [19]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

Writ of Error [Copy].

The President of the United States of America, to
the Honorable FRED M. BROWN, Judge of the
District Court, for the Territory of Alaska,
Third Judicial Division, Greeting:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court, before you, or some of you,
between Sadie Cotter, plaintiff in error, and Frank
J. Cotter, defendant in error, manifest error hath
happened, to the great damage of the said Sadie
Cotter, plaintiff in error, as is stated and appears
manifest and apparent in and by her petition herein.

We being willing that error, if any hath been,
should be duly corrected, and full and speedy jus-
tice done to the party aforesaid in this behalf, do
command you, if judgment be therein given, that then
under your seal, distinctly and openly, you send the
record and proceedings aforesaid, with all things con-
cerning the same, to the Justices of the United States
Circuit Court of Appeals for the Ninth Circuit, in
the city of San Francisco, in the State of California,

together with this writ, so as to have the same at the city of San Francisco, in the State of California, on the 22d day of December, 1914, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, and of the Territory of Alaska, should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 23d day of November, A. D. 1914. [20]

Attest my hand and the seal of the District Court for the Territory of Alaska, Third Division, in the Clerk's office at Valdez, Alaska, on the day and year last above written.

[Seal] ARTHUR LANG,
Clerk of the District Court for the Territory of Alaska, Third Division.

By T. P. Geraghty,
Deputy.

Writ of Error allowed this 23d day of November, 1914.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 23, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [21]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

**Order Extending Time in Which to File Records
in the United States Circuit Court of Appeals,
Ninth Circuit, on Writ of Error.**

This matter coming on to be heard on motion of the plaintiff, for an order extending the time, in which to file the records in the above-entitled cause, in the writ of error from the final judgment rendered in this court on the 16th day of October, 1914, to the United States Circuit Court of Appeals, for the Ninth Circuit, and it appearing to the satisfaction of the Court, that the time allowed in the writ of error is not sufficient time therefor.

It is therefore ordered, that the said Sadie Cotter, plaintiff in error herein, have to the 1st day of February, 1915, in which to have prepared the records in the above-entitled cause, on her writ of error heretofore issued in said cause, and to file the same in the said United States Circuit Court of Appeals, for the Ninth Circuit. Dated at Valdez, Alaska, this 23d day of November, 1914.

FRED M. BROWN,
District Judge.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Nov. 23, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy.

Entered Court Journal No. 8, page No. 435. [22]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

Citation on Writ of Error [Original].

United States of America,
Territory of Alaska,—ss.

The United States of America, to Frank J. Cotter,
and S. O. Morford, His Attorney of Record,
Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city and county of San Francisco, in the State of California, within thirty days from the date of this writing pursuant to a writ of error, which is filed in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein Sadie Cotter is the plaintiff in error, and you, Frank J. Cotter, are the defendant in error, and to show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUG-LASS WHITE, Chief Justice of the Supreme Court of the United States, this 23d day of November, 1914, and of the Independence of the United States, the one hundred and thirty-ninth.

[Seal] FRED M. BROWN,
Judge of the District Court for the Territory of Alaska, Third Division.

ARTHUR LANG,
Clerk of the District Court for the Territory of Alaska, Third Division.

By T. P. Geraghty,
Deputy.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. Nov. 23, 1914.
Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[23]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER, Plaintiff,
vs.
FRANK J. COTTER, Defendant.

Citation on Writ of Error [Copy].

United States of America,
Territory of Alaska,—ss.

The United States of America to Frank J. Cotter,
and S. O. Morford, His Attorney of Record,
Greeting:

You are hereby cited and admonished to be and

appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city and county of San Francisco, in the State of California, within thirty days from the date of this writing pursuant to a writ of error, which is filed in the Clerk's office of the District Court for the Territory of Alaska, Third Division, wherein Sadie Cotter is the plaintiff in error and you, Frank J. Cotter, are the defendant in error, and to show cause, if any there be, why the judgment in said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 23d day of November, 1914, and of the Independence of the United States, the one hundred and thirty-ninth.

FRED M. BROWN,
Judge of the District Court for the Territory of
Alaska, Third Division.

[Seal] ARTHUR LANG,
Clerk of the District Court for the Territory of
Alaska, Third Division.

By T. P. Geraghty,
Deputy.

[Endorsed]: Filed in the District Court for the Territory of Alaska, Third Division. Nov. 23, 1914.
Arthur Lang, Clerk. By T. P. Geraghty, Deputy.
[24]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

**Acknowledgment of Service of Papers on Writ of
Error in the Above-entitled Cause.**

I, the undersigned, S. O. Morford, attorney of record for the defendant in the above-entitled cause, hereby accept service, in the matter of the Writ of Error, issued out of the above-entitled court, in said cause, on the 23d day of November, 1914, by receiving copies of the original files and records as follows, to wit:

Bill of Exceptions.

Order Allowing and Approving Bill of Exceptions.

Assignment of Error.

Petition for Writ of Error.

Order Allowing Writ of Error.

Writ of Error.

Order Fixing Amount of Bond on Writ of Error.

Bond on Writ of Error.

Order Extending Time in Which to File Records in
the United States Circuit Court of Appeals,
Ninth Circuit.

Citation on Writ of Error.

Dated this 2d day of December, 1914.

S. O. MORFORD,

Attorney for Defendant and Defendant in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 8, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [25]

*In the District Court for the Territory of Alaska,
Third Division.*

No. 684.

SADIE COTTER,

Plaintiff,

vs.

FRANK J. COTTER,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please make, certify and transmit forthwith to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, a copy of the record in the above-entitled cause, as a return to the Writ of Error, heretofore sued out of said Circuit Court of Appeals, to review the judgment of said cause, which record shall consist of the following files and records, to wit:

Complaint.

Demurrer.

Order Sustaining Demurrer and Dismissing Action;

Exception to Said Order by Plaintiff, and Allowance of Said Exception by Court.

Bill of Exceptions.

Order Settling Bill of Exceptions.
Petition for Writ of Error.
Order Allowing Writ of Error.
Assignment of Errors.
Order Fixing Amount of Bond.
Bond for Costs and Supersedeas on Writ of Error.
Writ of Error and Copy.
Order Extending Time to File Writ of Error in Circuit Court of Appeals.
Citation and Copy of Citation.
Acknowledgment of Service of Papers on Writ of Error.
This Praeclipe.

LYONS & RITCHIE,
Attorneys for Plaintiff and Plaintiff in Error.

[Endorsed]: Filed in the District Court, Territory of Alaska, Third Division. Dec. 8, 1914. Arthur Lang, Clerk. By T. P. Geraghty, Deputy. [26]

*In the District Court for the Territory of Alaska,
Third Division.*

Certificate of Clerk U. S. District Court to Record.
United States of America,
Territory of Alaska,
Third Division,—ss.

I, Arthur Lang, Clerk of the District Court, Territory of Alaska, Third Division, do hereby certify that the above and foregoing, and hereto annexed 27 pages, numbered from 1 to 27, inclusive, are a full, true and correct transcript of the records and files

of the proceedings in the above-entitled cause, as the same appears on the records and files in my office;

That this transcript is made in accordance with the plaintiff's praecipe on file herein.

I further certify that the foregoing transcript has been prepared, examined and certified to by me and that the cost thereof, amounting to \$12.15, was paid to me by Messrs. Lyons & Ritchie, attorneys for the plaintiff and plaintiff in error herein.

In witness whereof I have hereunto set my hand and affixed the seal of this court at Valdez, Alaska, this 14th day of December, A. D. 1914.

[Seal] ARTHUR LANG,
Clerk of the District Court for the Territory of
Alaska, Third Division. [27]

[Endorsed]: No. 2532. United States Circuit Court of Appeals for the Ninth Circuit. Sadie Cotter, Plaintiff in Error, vs. Frank J. Cotter, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Third Division.

Filed December 24, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SADIE COTTER,
Plaintiff in Error, }
vs. } No. 2532
FRANK J. COTTER,
Defendant in Error.

ERROR TO THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA, THIRD
DIVISION.

Brief of Plaintiff in Error.

JOHN LYONS and E. E. RITCHIE,
Valdez, Alaska,
THOMAS R. LYONS and IRA D. ORTON,
1102-5 Alaska Bldg., Seattle, Washington,
Attorneys for Plaintiff in Error.

Filed
12-10-1919

IN THE
**United States
Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

SADIE COTTER,
Plaintiff in Error, }
vs.
FRANK J. COTTER,
Defendant in Error. } No. 2532

ERROR TO THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA, THIRD
DIVISION.

Brief of Plaintiff in Error.

JOHN LYONS and E. E. RITCHIE,
Valdez, Alaska,
THOMAS R. LYONS and IRA D. ORTON,
1102-5 Alaska Bldg., Seattle, Washington,
Attorneys for Plaintiff in Error.

IN THE
**United States
Circuit Court of Appeals**
FOR THE NINTH CIRCUIT

SADIE COTTER,
 Plaintiff in Error, }
 vs. No. 2532
FRANK J. COTTER, }
 Defendant in Error.

ERROR TO THE DISTRICT COURT FOR THE
DISTRICT OF ALASKA, THIRD
DIVISION.

Brief of Plaintiff in Error.

STATEMENT.

This action was brought by the plaintiff in error to recover judgment against the defendant in error on a decree made and entered on the 14th day of May, 1913, by the Superior Court of the State of Washington, for King County, wherein said Court decreed a dissolution of the bonds of matrimony theretofore existing between the plaintiff in er-

ror and the defendant in error, and awarded the plaintiff in error permanent alimony in the sum of fifty dollars (\$50) per month, and further directed that the defendant in error pay certain outstanding indebtedness of the plaintiff in error, in the sum of seven hundred fifty dollars (\$750.00). The defendant in error demurred to the complaint on the following grounds, to-wit:

1st. That the Court had no jurisdiction of the subject matter of the action.

2nd. That the plaintiff has no legal capacity to sue.

3rd. That the plaintiff's complaint does not state facts sufficient to constitute a cause of action against this defendant.

The Court sustained the demurrer of the defendant in error and dismissed the action.

SPECIFICATION OF ERRORS.

1. The Court erred in making and entering its order, on the 16th day of October, 1914, sustaining the demurrer of the defendant to the complaint filed by the plaintiff on the 13th day of August, 1914, and in deciding that such complaint does not state facts sufficient to constitute a cause of action, in favor of the plaintiff and against the defendant.

2. The Court erred in making and entering its order and judgment on the 16th day of October, 1914, wherein and whereby it ordered and adjudged that plaintiff's complaint and action be

dismissed upon the merits, and that defendant recover from said plaintiff his costs in said action.

ARGUMENT.

The two assignments of error may be considered and discussed under one head.

While the Court apparently sustained the demurrer on all of the grounds assigned therein, it cannot be seriously contended that the trial court was without jurisdiction of the subject matter of the action, as the trial court has jurisdiction of any action on a judgment or decree of a sister state or territory.

"The acts of the legislature of any state or territory or of any country subject to the jurisdiction of the United States shall be authenticated by having the seals of such state, territory or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

U. S. Rev. St., Sec. 905.

U.S. Comp. St. (1901), p. 677.

It is equally obvious that the second ground of the demurrer is without merit, for any person who

has recovered a valid judgment can maintain an action on such judgment in a sister state or territory. The only point to be considered is whether or not the plaintiff sued in this action on a valid judgment, and that question can be determined by ascertaining whether or not the complaint states a cause of action. The insufficiency of the complaint in that respect is the third and last ground assigned in the demurrer as a reason for the dismissal of the action.

We contend that the complaint does state a cause of action, for the following reasons:

I.

Because the complaint alleges in paragraphs four (4) and six (6), (Tr. 2 and 3), that there was at the time of the commencement of the action, accrued and unpaid alimony due on the decree in suit from the defendant in error to the plaintiff in error, the sum of six hundred fifty dollars (\$650.00).

II.

Because paragraph five (5) of the complaint, (Tr. 2) alleges that the decree in suit directed the defendant in error to pay certain outstanding indebtedness of the plaintiff in error, in the sum of seven hundred fifty dollars (\$75.00), and that defendant in error has paid no part thereof except

the sum of one hundred twenty dollars (\$120.00).

On the subject of over-due alimony, the complaint alleges among other things (Tr. pp. 1-4), that the Superior Court of the State of Washington for King County, was at all times mentioned therein a court of general jurisdiction; that on the 27th day of January, 1913, the plaintiff in error commenced an action for a divorce in said court against the defendant in error; that said defendant in error was duly served with process therein, and on the 8th day of May, 1913, appeared in said action and submitted himself to the jurisdiction of the Court.

That thereafter, on the 14th day of May, 1913, such proceedings were had in said Court and cause whereby a decree was duly given, made, entered, enrolled and docketed in said Court, in favor of the plaintiff in error dissolving the bonds of matrimony which then existed between the plaintiff in error and the defendant in error.

That said decree further provided and ordered that the defendant in error pay to the plaintiff in error, as permanent alimony, the sum of fifty dollars (\$50.00) per month, the same to be paid on the first day of each and every month from the date of the entry of said decree.

That said decree further provided that the defendant in error should pay certain outstanding indebtedness incurred by the plaintiff in error, in the sum of seven hundred fifty dollars (\$750.00);

that no part of the same has been paid except the sum of one hundred twenty dollars (\$120.00), and that there is now due and owing the plaintiff in error from the defendant in error, the sum of six hundred thirty dollars (\$630.00), together with interest thereon at the rate of eight per cent (8) per annum from date until paid.

That the defendant in error has not paid said alimony, or any part thereof, and that there is now due and owing on account of the same from the defendant in error to the plaintiff in error, the full sum of six hundred fifty dollars (\$650.00), together with interest thereon at the rate of eight per cent (8) per annum from date until paid.

That no appeal has been taken by the defendant from the entry or provision of said decree, nor has the same been set aside or modified in any way and such decree and the whole thereof is now in full force and effect.

That said Superior Court for King County, in the State of Washington, is duly empowered and authorized under the laws of said state to grant permanent alimony, as provided by said decree,—a copy of the Statutes of the State of Washington relative thereto being as follows, and hereby made a part of this complaint:

“In granting a divorce the Court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the merits of the parties and to the con-

dition in which they shall be left by such divorce, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, support and education of the minor children of such marriage."

The section of the Statute of the State of Washington under and by virtue of which the Washington Court entered the decree awarding alimony to the plaintiff in error, the force and effect of which is set out in the complaint, provides as follows:

"In granting a divorce, the Court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the merits of the parties and to the condition in which they shall be left by such divorce, and to the burdens imposed upon it for the benefit of the children, and shall make provision for the guardianship, custody, support and education of the minor children of such marriage."

Remington & Ballinger's Code, Section 989.

That the Superior Court of the State of Washington was authorized to enter a decree awarding permanent alimony in a suit for divorce under the section of the statute, *supra*, is upheld by numerous decisions of the Supreme Court of that State.

In re Cave, 26 Washington, 213.

Markawski vs. Markawski, 44 Washington, 594.

Claiborne vs. Claiborne, 47 Washington, 200.

Ramsdell vs. Ramsdell, 47 Washington, 444.

The Supreme Court of the State of Washington has also held that the awarding of perma-

ment alimony in monthly installments until the further order of the Court, does not preclude the Court from subsequently, upon application, discontinuing the alimony permanently.

Mahncke vs. Mancke, 43 Washington, 425.

But the Supreme Court of that State has also held that there is no power in the Court under the statute to cancel alimony which had already accrued and was due the plaintiff in error under the decree.

In *Harris vs. Harris*, 71 Washington, 307, the Court says, on page 309:

"The only final feature of a judgment of this character is as to each installment of alimony as it becomes due. As to these installments, the rights and liabilities of the parties become absolute and fixed at the time provided in the decree for their payment, and to this extent the judgment is a final one."

Beers vs. Beers, 74 Washington, 458, wherein the Court, on page 461, says:

"On the question of the power of the Court to modify a decree as to these instalments of alimony past due and unpaid, the law appears to be that such power does not exist. The rights and liabilities of the parties with reference to such installments become absolute and fixed at the time provided in the decree for their payment, and as to such, the decree is not subject to modification."

The trial court evidently proceeded on the theory that the Court of the State of Washington, which made and entered the decree, had power to set aside and cancel the provisions of the decree

relating to alimony, regardless of whether or not such alimony had already accrued. The question as to the power of the Court to set aside and cancel a decree as to over-due alimony has been before the Supreme Court of the United States on three different occasions:

Barber vs. Barber, 62 U. S. (21 How.), 582.
Lynde vs. Lynde, 181 U. S. 183.
Sistare vs. Sistare, 218 U. S. 1, 30 Sup. Ct. Rep. 692.

In re *Barber vs. Barber*, *Supra*, suit was brought in the District Court of the United States, for the District of Wisconsin, by Mrs. Barber, through her next friend, George Cronkhite, a citizen of the State of New York, against Hiram Barber, a citizen of the State of Wisconsin, on a decree entered by a court of general jurisdiction in the State of New York, providing for the payment, in quarterly installments, of the annual sum of three hundred sixty dollars (\$360.00) alimony, each and every year. The complaint, among other things, set out the proceedings of the Court in the State of New York, divorcing Mr. and Mrs. Barber from bed and board, and alleging that the defendant had not paid any part of the alimony adjudged to Mrs. Barber, and that there was then due to her on that account the sum of \$4242.15. The trial court entered a decree in favor of the plaintiff, and the Supreme Court, in affirming the judgment, among other things, said:

"The parties to a cause for divorce and for alimony are as much bound by a decree for both, which has been given by one of our State Courts having jurisdiction of the subject matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical Court of England. The decree of both is a judgment of record and will be received as such by other courts. And such a judgment or decree rendered in any state of the United States, the court having jurisdiction, will be carried into judgment in any other state to have the same binding force that it has in the state in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the states have jurisdiction."

It may be contended that *Barber vs. Barber* has been overruled by *Lynde vs. Lynde, Supra*, and it is true that some of the language used in *Lynde vs. Lynde* might warrant such an inference. But it will be observed on a careful reading of the whole case that it was not the intention of the Court to overrule *Barber vs. Barber*, for the opinion does not refer to the latter case.

The Court, in *Sistare vs. Sistare, Supra*, limits the force and effect of the opinion in *Lynde vs. Lynde*, to the extent that the power of the Court to modify a decree for alimony cannot apply to overdue alimony unless such power is specifically granted to the court by statute.

The opinion in *Sistare vs. Sistare* is exhaustive, and the limitations on the power of the Court to disturb judgments or decrees for overdue alimony

are carefully analyzed. In the course of the opinion in that case, the Court says:

"We think the conclusion is inevitable that the Lynde case cannot be held as overruling the Barber case, and therefore that the two cases must be interpreted in harmony one with the other, and in so doing it results: * * *

That generally speaking, where a decree is rendered for alimony, and is made payable in future installments, the right to such installments become absolute and vested upon becoming due, and is therefore protected by the full faith and credit clause, provided no modification of the decree has been made prior to the maturity of the installments."

The Court further says, in the course of the opinion:

"In considering the meaning of these provisions, it must be borne in mind that the settled rule in New York is that the Courts of that state have only the jurisdiction over the subject of divorce, separation and alimony conferred by statute, and that the authority to modify or amend a judgment awarding divorce and alimony must be found in the statute or it does not exist."

And further, the Court says:

"Other than the provision in Section 1767, authorizing the revocation of a judgment for separation upon the joint application of the parties, the power of the court to vary or modify a judgment for alimony, if it existed in 1899, was to be found in Section 1771. It is certain that authority is there given to the Courts of New York to modify or vary a decree for alimony by the following: 'The Court may, by order, upon the application of either

party to the action, after due notice to the other, to be given in such manner as the Court shall prescribe, at any time after final judgment, vary or modify such directions. But no such application shall be made by a defendant unless leave to make the same has been previously granted by the Court by order made upon, or without, notice, as the Court in its discretion may deem proper after presentation to the Court of satisfactory proof that justice requires such an application should be entertained.' But it is equally certain that nothing in this language expressly gives power to revoke or modify an installment of alimony which had accrued prior to the making of an application to vary or modify, and every reasonable implication must be resorted to against the existence of such power in the absence of clear language manifesting an intention to confer it. The implication, however, which arises from the failure to expressly confer authority to retroactively modify an allowance of alimony is fortified by the provisions which are expressed. Thus, the methods of enforcing payments of future alimony awarded, provided by statutes, all contemplate the collection and paying over as a matter of right, of installments as they accrue, as long as the judgment remains unmodified, or at least until application has been made or permission to make one in pursuance to the statute has been accorded. And the force of this suggestion is accentuated when it is considered that it was not unusual in New York to resort to executions as upon a judgment at law, to enforce the collection of unpaid installments of alimony. *Wetmore vs. Wetmore*, 149 N. Y. 520, 527; 33 L. R. A. 708; 52 Am. St. Rep. 752; 44 N. E. 169. Indeed, as in principle, if it be that the power to vary and modify operates retroactively and may affect past-due installments so as to relieve of the obligations to pay such installments, it would follow, in the nature of things, that the power would exist to increase the

amount allowed, it is additionally impossible to imply such authority in the absence of provisions plainly compelling to such conclusion. Beyond all this, when it is considered that no provision is found looking to the repayment by the wife of any installments which had been collected from the husband in the event of retroactive reduction of the allowance, it would seem that no power to retroactively modify was intended."

It is rarely that a Court in any case will enter a decree for the payment of a certain lump sum of alimony, for the reason that the party required by the Court to pay such alimony may be, and usually is, unable financially to pay such a sum as the Court might feel warranted in entering in lieu of alimony in the form of installments in the future, and if a judgment for past-due installments of alimony cannot be enforced, in a sister state or territory, any party required to pay alimony can avoid all liability under such a judgment by changing his residence to another state or territory, and he would be relieved of all his obligations to provide for the support of his children and his divorced wife, and thereby render the provisions of the decree, compelling him to make provision for their support, nugatory. It seems to us that the opinion of Chief Justice White, in *Sistare vs Sistare*, *Supra*, clearly discloses the unsoundness of the doctrine which the trial court in the case at bar must have adopted in sustaining the demur-rer.

The question as to the right of a party to

sue on a judgment for past due installments of alimony in a sister state or territory has been considered in the late case of *Gilbert vs. Hayward*, reported in 92 Atl. Rep. p. 625, No. 9 Advance Sheets, 625, where a great many cases are cited and the rule laid down in *Sistare vs. Sistare, Supra*, is followed.

We contend that the demurrer should also have been overruled for the second reason assigned in this brief. Paragraph 5, page 2, of the Transcript, alleges that the decree further provided that the defendant in error should pay certain outstanding indebtedness of the plaintiff in error, in the sum of seven hundred fifty dollars (\$750.00); that no part of the same has been paid except the sum of one hundred twenty dollars (\$120.00), and that there is now due and owing from the defendant in error to the plaintiff in error the sum of six hundred thirty dollars (\$630.00).

It is true it is not alleged that the provision in the decree referred to directs the defendant in error to pay the plaintiff in error a specified sum of money, but it does direct the defendant in error to pay said indebtedness for the plaintiff in error, and it is alleged that the defendant in error had failed to comply with the mandate of the decree in that respect. It may be contended that the beneficiary under such provision of the decree is the creditor of the plaintiff in error, and therefore that such creditor is the only party who could main-

tain an action to enforce that provision of the decree; but we submit that the plaintiff in error, being the record owner of the judgment, and for whose benefit the Court directed the defendant in error to pay the indebtedness referred to, is the person at whose instance this particular provision of the decree should be enforced.

"An action on a judgment must be prosecuted by the real and beneficial owner of it, whose title to it must appear of record or by some formal transfer, and the suit cannot be maintained by a third person not answering these conditions, although the judgment may in some way define his right or insure to his benefit or protection."

23 Cyc. 1507.

Kohlberg vs. Benton, 45 Calif. 265.

Taylor's Appeal, 45 Pa. St. 71.

It is respectfully submitted that the judgment of the Trial Court should be reversed and a new trial granted.

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In the United States Circuit
Court of Appeals for
the Ninth District.

SADIE COTTER,

Plaintiff in Error,

vs.

FRANK J. COTTER,

Defendant in Error.

No. 2532

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE TER-
RITORY OF ALASKA, THIRD DIVISION.

BRIEF FOR DEFENDANT IN ERROR

S. O. MORFORD,

Attorney for Defendant in Error.

Seward, Alaska.

In the United States Circuit Court of Appeals for the Ninth District.

SADIE COTTER,
Plaintiff in Error, }
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1990) among long-distance

adults along the coast of

western North America.

It is also possible that the observed

decrease in the number of

adults in the eastern United States

is due to a decrease in the number

of young-of-the-year fish in the

area, which may be due to a

decrease in the number of eggs

and larvae in the area, or to a

decrease in the number of

adults in the area, or to a

decrease in the number of

In the United States Circuit Court of Appeals for the Ninth District.

SADIE COTTER, Plaintiff in Error,
 }
 vs. No. 2532
FRANK J. COTTER, Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE TER-
RITORY OF ALASKA, THIRD DIVISION.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT OF THE CASE.

Plaintiff's action is brought upon a decree rendered in the Superior Court, State of Washington, for the County of King, May 14, 1913, in favor of plaintiff, appellant herein, and against the defendant, appellee herein, in an action for divorce wherein both parties appeared.

The material parts of the complaint are as follows:

I.

"That at all times hereinafter mentioned the Superior Court, of the State of Washington, for the

County of King, was a court of general jurisdiction over matters in equity and law, duly created and organized by the laws of that State."

III.

"That thereafter, and on the 14th day of May, 1913, such proceedings were had in said court and cause whereby a decree was duly given, made, entered, enrolled and docketed in said court in favor of the plaintiff, dissolving the bonds of matrimony which existed between the plaintiff and defendant."

IV.

"That said decree further provided and ordered that the defendant pay to the plaintiff, as permanent alimony, the sum of Fifty Dollars (\$50.00) per month, the same to be paid on the 1st day of each and every month from the date of the entry of said decree."

V.

"That said decree further provided that the defendant should pay certain outstanding indebtedness incurred by the plaintiff in the sum of Seven Hundred Fifty Dollars; that no part of same has been paid except the sum of One Hundred Twenty Dollars (\$120.00), and there is now due and owing from the defendant to the plaintiff the sum of Six Hundred Thirty Dollars (\$630.00), together with interest thereon at the rate of eight per cent (8) per annum from date until paid."

IX.

"That said Superior Court for King County, in the State of Washington, is duly empowered and authorized under the laws of said State to grant permanent alimony, as provided by said decree,—a copy of the Statutes of the State of Washington relative thereto being as follows, and hereby made a part of this complaint:"

"In granting a divorce, the Court shall also make such disposition of the property of the parties as shall appear just and equitable, having regard to the relative merits of the parties and to the condition in which they shall be left by such divorce, and to the burdens imposed upon it for the beniflt of the children, and shall make provision for the guardianship, custody, support and education of the children of such minor marriage." (minor children of such marriage.)

To the complaint the defendant demurred upon three grounds:

I.

That the court has no jurisdiction of the subject matter of the action.

II.

That the plaintiff has no legal capacity to sue.

III.

That plaintiff's complaint does not state facts suf-

ficient to constitute a cause of action against this defendant.

ARGUMENT.

It does not appear from said complaint that the Superior Court, State of Washington, for the County of King, has jurisdiction over cause of divorce, and although alleging said court to have general jurisdiction of actions of law and equity, it is not sufficient to show that said court had jurisdiction of the subject matter of this action. The jurisdiction of marriage and divorce in this country is purely statutory:

Rumping v. Rumping, Mont., 91 Pac. 1057,
12 L. R. A. (N. S.) 1200

wherein the Court says: "It is elementary, of course, that neither courts of law nor equity have any inherent power to dissolve marriage. The power to decree divorce is purely statutory. Irwin v. Irwin 3 Okla. 186, 41 Pac. 369."

"No American tribunal has jurisdiction of divorce except by statute." Sharon v. Sharon, 67 Calif. 206.

The presumption of jurisdiction in favor of a court of general jurisdiction does not apply when the court acts in a special capacity and not in accordance with common law.

In Commonwealth v. Blood, 97 Mass. 538, 13 Ency. Law, page 997, the court said: "The paper offered as a record was not admissible. There is no proof that the court in California had jurisdiction of the

cause or the parties. Although a court of record, its jurisdiction over the subject of divorce is special authority not recognized by common law, and its proceedings in relation to it stand on the same footing with those of courts of limited and inferior jurisdiction; so that its powers in the case must be shown and appear to have been strictly pursued."

In Galpin v. Page, 18 Wall. U. S. 350, 365, 21 L. ed. 962, Justice Field says:

"It is undoubtedly true that a superior court of general jurisdiction, proceeding within the general scope of its powers, is presumed to act rightly.*** This presumption embraces jurisdiction not only of the cause or subject matter of the action in which the judgment is given, but of the parties also.***The rule is different with respect to courts of special and limited authority; as to them there is no presumption of law in favor of their jurisdiction; that must affirmatively appear by sufficient evidence or proper averment in the record or their judgments will be deemed void on their face."

The court further said: quoting from Morse v. Presby 5 Fost. N. H. 302.

"A court of general jurisdiction may have special and summary powers, wholly derived from statutes, not exercised according to the course of common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited

and special jurisdiction. The jurisdiction in such cases, both as to the subject matter of the judgment, and as to the persons to be affected by it, must appear by the record; and every thing will be presumed to be without the jurisdiction which does not distinctly appear to be within it." The court further said:

"Where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class of cases not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear upon the record."

In *Northcut v. Lemery*, 8 Ore. 317 et seq. the court said:

"There is another reason why the decree made in the divorce suit cannot be upheld. The court which rendered it, although one of general jurisdiction, was then exercising a special power conferred upon it by statute, and not according to the course of common law. And in such cases, even a court of general jurisdiction must strictly comply with the requirements of the statute in its proceedings, and this compliance must affirmatively appear from the record itself; and unless it does so appear, no presumption will be indulged to sustain the validity of its judgments or decrees." Affirmed in *Furgeson v. Jones*, 17 Ore. 204. See, also, *Dick v. Wilson*, 10 Ore. 490.

In Kelley v. Kelley,—Mass.—25 L. R. A. 806.

The court in passing upon the question of the jurisdiction of marriage and divorce, held that courts of general jurisdiction of law or equity had no inherent jurisdiction to grant divorce and alimony without statutory authority, that the jurisdiction of the court of chancery of this state in actions for divorce, either on the ground of nullity or for any cause arising subsequent to marriage, is founded wholly upon the statutes.

In Erkenbrach v. Erkenbrach, 96 N. Y. 456, the court said:

“The courts in this state have no common-law jurisdiction over the subject of divorce, and their authority is confined altogether to the exercise of such express and incidental powers as are conferred by the statute.”

In Simmons v. Saul, 138 U. S. 513, 34 L. ed. 1054, the court said:

“It is the settled doctrine of this court that the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject matter or the parties affected by it, nor into the facts necessary to give such jurisdiction.” Citing Thompson v. Whitman, 85 U. S. 18 Wall. 457, 21 L. ed. 897; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538.

The only allegation in plaintiff's complaint tending to show jurisdiction of the subject matter by the Superior Court, State of Washington, for the County of King, is found in paragraph IX. of plaintiff's complaint, supra, and the statute claimed to grant such authority is purported to be quoted. Said quoted section does not show authority of said Superior Court to grant divorce or alimony. Said law does not authorize any court to grant alimony, but provides only for such division or disposition of the property of parties as shall appear just and equitable. There is nothing in the complaint to show that any property was considered by the court in said action. The judgment only provides for the permanent dissolution of the marriage, and then the court further decrees that the defendant pay to the plaintiff, as permanent alimony, the sum of Fifty Dollars per month, the same to be paid on the 1st day of each and every month from the date of the entry of said decree. And also further decrees that the defendant shall pay certain outstanding indebtedness incurred by the plaintiff. There is no judgment for a certain sum of money, or for costs against the defendant. It is not such a judgment or decree upon which execution could be issued, and had the court authority to make such a judgment and decree, execution could not be issued thereon without a further order of the court for over-due instalments of alimony, nor could execution issue to enforce payment of certain sums of money to individuals not party to the suit. Such a decree being wholly within the power of the

court granting it to be enforced by subsequent orders.

In Hunt v. Monroe,—Utah,—91 Pac. 269, 11 L. R. A. (N. S.) 253, the court in discussing the same proposition, stated:

“But the fact that a sum is not specifically fixed as due from one to the other of the parties to the original suit, and certain sums are to become due in the future and payable in instalments or otherwise, does defeat the right of action, unless the amount due is ascertained and fixed by some appropriate proceeding before the action on the judgment or order or decree is commenced.” Approved in Wells v. Wells, 209 Mass. 282, 35 L. R. A. (N. S.) 561.

In Barclay v. Barclay, 184 Ill. 375, 51 L. R. A. 351, the court said:

“The liability to pay alimony is not founded upon a contract, but is a penalty imposed for failure to perform a duty.***The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree.”

Appellants rely mainly upon the case of Barber v. Barber, 21 How. 582, 16 L. ed. 226, rendered by a divided court, three judges dissenting, and Sistare v. Sistare, 218 U. S. 1, 54 L. ed. 905. 28 L. R. A. (N. S.) 1068.

Barber v. Barber was upon judgement rendered in the State of New York. The judgment rendered therein for future payments of the instalments was by the decree made permanent, and that such future payments should bear interest as they became due, and that execution might issue therefor *toties quoties*, thus becoming a fixed sum due and payable without order of court or further proceeding required, other than the issuance of an execution.

In Sistare v. Sistare, a decree for future payments of alimony, it was decreed that the plaintiff have leave to apply from time to time at the foot of the judgment as may be necessary to enforce the decree. No question was raised in this case that no such order had been issued prior to instituting the suit upon the New York judgment in the state of Connecticut.

Such judgments under the law of New York, as determined by the Supreme Court, are fixed and final and not subject to change or modification, and the decision of the Supreme Court of the United States was based upon the construction of the New York Statute by the New York courts. The Supreme Court of the United States follows the decisions of the several state courts in their construction of their statutes where no constitutional question arises.

Lynde v. Lynde, 181 U. S. 183, 45 L. ed. 810 was an action brought in the State of New York upon a de-

cree from the Chancery court of New Jersey, in which the Supreme Court of the United States sustained the judgment of the Chancery Court of New Jersey and the appellate court of New York for the sum found due upon the date of the New Jersey decree. It appears clearly from the record that no final order or judgement had been entered in the New Jersey court for any of the instalments of alimony due or to become due after the time of entering the New Jersey decree.

It is apparent from these decisions and the authorities cited in their support, that before a judgment of a court of one state or territory can be sued on in a sister State under the full faith and credit clause of the Constitution of the United States, the orginal judgment must be one for a definite sum of money enforceable by execution without further order or decree, and this would appear to be the case whether the order or decree was final or subject to modification.

The Supreme Court of the United States in the case of Sistare v. Sistare based its opinion upon the consrtuction of the law of New York by the New York courts in holdng that a judgment for past due instalments of alimony, under the laws of New York, was final judgment fixed and determined by the court and not subject to change or modification, thus distinguishing the case from that of Lynde v. Lynde wherein it was held that a decree for future payment of alimony rendered by the court of chanc-

ery of New Jersey was not a final judgment. The court in the Lynde case said:

"The decree of the court of chancery of New Jersey, on which the suit is brought, provides, first, for the payment of \$7,840 for alimony already due, and \$1,000 counsel fee; second, for the payment of alimony since the date of the decree at the rate of \$80 per week;"***

"The decree for the payment of \$8,840 was a fixed sum already due, and the judgment of the court below was properly restricted to that. The provision of the payment for alimony in the future was subject to the discretion of the court of chancery of New Jersey, which might at any time alter it, and was not a final judgment for a fixed sum."

The Lynde case was followed in *Israel v. Isreal*, 148 Fed. Rep. 576, 9 L. R. A. (N. S.) 1168, and in *Hunt v. Monroe*, 11 L. R. A. (N. S.) 249.

Where the statutes and decisions in the foreign state are not clear and decisive on the question involved in this case, the rule laid down in the following case is undoubtedly the law that should govern.

Alexander v. Alexander, 13 App. D. C. 334, 45 L. R. A. 806, is a learned and elaborate discussion of the law of divorce and alimony.

In this case a decree of the court of the District of Columbia granted a divorce, and awarded to the divorced wife \$50.00 a month alimony payable by the defendant to the plaintiff after the date of the

decree. On various applications, under the decree, for an increase and decrease of alimony a judgment was rendered directing the defendant to pay \$25.00 a month for a certain period, and \$30.00 a month thereafter. The plaintiff then filed a bill of review praying cancellation of the orders of the court modifying alimony in the original decree and that the original allowance of \$50.00 a month be renewed.

The statute upon which the orginal decree was rendered is based upon the following section, which provides that, "in all cases where a divorce is granted, the court allowing the same shall have power, if it see fit, to award alimony to the wife, and to retain her right of dower." The court said:

"Now, what were the usages and customs, and what was the jurisdiction of the ecclesiastical courts, and of the courts of chancery in the matter of alimony at and before the time of the passage of the act of Congress of 1860? Beyond all question, the jurisdiction of these courts was not exhausted by the rendition of the original decree. The decree for a seperation was final; the adjudication that alimony to some extent was payable may have been final; but it was never contended or maintained that the amount of alimony then fixed was absolutely final and conclusive for all time, and could not afterwards be modified; on the contrary, the authorities appear to be unanimous to the effect that the adjudication was a continuing one, and that the courts retained the whole subject under their control, increasing or diminishing the amount of alimony from time to

time, as might seem just under changed or changing circumstances; and this without reference to the fact that the original decree might have been entirely silent in regard to the reservation of the right of the parties, or either of them, thereafter to apply to the court for modification."

The statutes of the State of Washington do not provide for permanent alimony. The only provision made is for a division of property. If any right exists in the court of Washington to grant permanent alimony it is by virtue of the right of the wife to maintenance and support and such decree must be by virtue of statute, as declared in the case of Alexander v. Alexander, and is not a final judgment, but one subject to modification and change by the court which granted it, according to the conditions of the parties. A diligent search of the decisions of the courts of the State of Washington fails to disclose any authority direct in point.

State v. Cave, 26 Wash. 213, is a habeas corpus action to release the defendant from arrest under contempt proceedings, for failure to pay alimony granted under decree of divorce. The question was raised as to the authority of the court in divorce proceedings to grant permanent alimony. The court said:

"While no express authority is found in the statutes of this state for permanent alimony *eo nomine* after divorce," then cites the section of the Washington statute set out in the complaint herein, and fur-

ther says: "The court is here unrestrained as to the provision to be made for the maintenance of the minor children. The circumstances of each case alone determine what provision should be made for such children."

In the case at bar there are no minor children, and the conclusion must be reached that the law does not authorize the court to grant permanent alimony to the wife. The court further said: (State v. Cave, *supra*.)

"Where the statute is silent as to the remedy, the court has inherent power to enforce its judgments or decrees and orders according to its equity powers. The silence of the statue in this respect does not take away any of the power lodged in the court by its equity jurisdiction. In this state no rule is provided by statute for the enforcement of such decrees, but the rule of attachment has been generally followed in the practice and approved by this court."

In *Smith v. Smith*, 17 Wash. 430, where the plaintiff was allowed by final decree \$25 per month as alimony and for the support of said children, the court said:

"It is the duty of the courts to enforce their orders, and when it comes to their knowledge that such orders are not obeyed they should require and enforce such obedience by punishment for contempt."

King v. Miller, 10 Wash. 274, was an action

brought by Hannah A. King, the divorced wife of James B. King, to obtain relief with reference to alimony allowed her by the decree of divorce previously granted. In the action for divorce the court awarded the custody of the children to the plaintiff, and provided that defendant should pay her \$50.00 per month for the maintenance of herself and children, and provided that the payment of such sums should be secured by a lien upon certain real estate. After default in the payment, the plaintiff applied to have said allowance consolidated in a gross sum at its present value, and to have the lien therefor upon the real estate foreclosed. Upon the trial the court rendered a decree establishing the mortgage claim as a prior lien upon a portion of the property, and decreed that the alimony previously allowed should be modified and reduced to a gross sum of \$2,500. and that the property upon which the lien had been created should be sold to satisfy the same, from which decree the defendant appealed. On appeal the supreme court sustained the decree as modified, and evaded the issue upon the question of granting permanent alimony, and said:

“Notwithstanding the fact that a decree of divorce should conclude property rights so far as the husband and wife are concerned, the court thereafter might entertain a proceeding brought to obtain an allowance or provision for the support of minor children.”

From the laws of Washington and from the decisions of the State, it must appear that a decree of

the Court of the State of Washington granting future alimony, or division of property, is at all times subject to modification by the court granting the decree, and the only method of enforcing said decree is by proceedings in contempt.

The authorities cited by appellant and based upon the decisions in the Sistare v. Sistare and Barber v. Barber cases are not in point under the laws of the State of Washington. The decision in the case of Lynde v. Lynde clearly states the law in this case.

From the laws and decisions of the State of Washington, giving the utmost latitude to the statute, the plaintiff under the decree could have no other right to enforce the same, except by contempt proceedings, and no proceeding could be had under execution until plaintiff had secured an order of the court granting the decree and entering judgment for the amount of alimony due and unpaid, and no action in a sister state could be brought upon the decreee for future payment of alimony until final judgment for the amount in arrears due and unpaid had been rendered in the court having original jurisdiction.

As to that part of the decree for the payment of certain sums of indebtedness, contracted by plaintiff, to persons not parties to the action, no right of action would accrue to the plaintiff, under any construction of the case, until she had shown that she had paid the same.

In Wells v. Wells, 209 Mass. 282, 35 L. R. A. (N. S.) 561. The court held that an order for future

payments of alimony, as a provision for future support, being ordinarily liable to modification at any time, is subject to the control of the court which made the order, and so is not a final order for the payment of a fixed sum.

"Judgments of State Courts are not entitled, under United States constitution, to any higher or other effect in sister states than that which may be claimed for them in the state where rendered, according to her statutes and procedure." Suydam v. Barber 18 N. Y. 469, 75 Am. D. 254. Cited and approved in Union & Planters Bank of Memphis v. City of Memphis, 111, Fed. Rep. 561, and in Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. ed. 687.

In Barclay v. Barclay, Supra, the court said:

"The liability to pay alimony is not founded upon a contract, but is a penalty imposed for failure to perform a duty.***The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is arrears in payments required under the decree."

In re Nowell, 99 Fed., 931, was an action to enjoin the wife from collecting alimony by reason of the defendant's discharge in bankruptcy. In determining the question the court held:

"According to the decision and the existing statutes, alimony appears now to be an allowance made

by the decree of a competent court for the benefit of a wife. In a sense, this decree fixes the amount to be paid during the joint lives of husband and wife; but not only is the decree always open to modification in respect of future alimony by reason of a change in the situation of husband or wife, but also, if the wife seeks legal process to collect the arrears which have not been paid to her according to the decree, that process will not issue as a right or without notice to the husband. Upon order of notice to the husband to show cause why process should not issue, he may, without modification of the original decree, move that the amount to be collected by the process be reduced, by reason of a change in his circumstances or in those of his wife. The process granted may be execution, scire facias, or an attachment for contempt."

In *Audubon v. Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, it was held that neither the alimony in arrears at the time of the adjudication in bankruptcy, nor alimony accruing since that adjudication, was provable in bankruptcy or barred by the discharge. That it was not unconditional and unchangeable, that it might be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction.

Prior to the Act of Congress, Feb. 5, 1903, amending Act of July 1, 1898, no provision existed in the Bankruptcy Act designating alimony as a debt not provable in bankruptcy. The decisions were based

upon the construction that decrees for future payment of alimony were subject to modification by the courts granting them, and were not decrees for a fixed and determined debt.

In *Van Horn v. Van Horn*, 48 Wash. 389, (quoting from Syllabus.)

"An action does not lie in this state to recover temporary alimony upon an order therefor made in an action for divorce in another state, although appealable as a final order under the laws of such state; since it is subject at all times to modification in the foreign court."

The court in this case has no jurisdiction under the full faith and credit clause of the constitution.

The decisions of several courts following either the decision of the Barber case, or the Lynde case, or Sistare case seem in some instances not to note the true distinction between judgments that are entitled to be enforced under the full faith and credit clause, and those that are not so entitled. It would appear that a judgment to be entitled to the full faith and credit clause in a sister state must be such a judgment as could be enforced by an execution in the state where it was rendered without further proceedings being had in the case, and such a judgment as is recognized by the decision of the state which rendered it as one that is final and unchangeable by the court rendering it.

The decisions of the state courts construing their statutes, and the judgments rendered there-

under must determine the law governing the sister state in an action brought under the full faith and credit clause of the constitution of the United States.

In *Shelby et. al. v. Guy*, 11 Wheaton, 361, 6 L. ed. 496, the court said:

"That the statute law of the states must furnish the rule of decision to this court, as far as they comport with the constitution of the United States in all cases arising within the respective states, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws in their own courts makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction."

(Owing to the fact that no brief on behalf of plaintiff in error has been served on defendant in error, it is impossible to directly answer the arguments that appellant may make. Under rule 24 sufficient time is not given to prepare and file a reply brief after the last day given appellant to serve the opening brief.)

From plaintiff's complaint and the foregoing decisions it must appear.

I.

That plaintiff's complaint does not show that the court granting the decree in the State of Washington, was a court having jurisdiction of divorce and alimony.

II.

That if the court holds that it takes judicial notice of the jurisdiction of the courts of the different states, than it must appear that under the statutes of the State of Washington there is no authority for granting permanent alimony.

III.

That if the courts of the State of Washington are authorized indirectly to provide for future alimony in divorce proceedings, then such decrees are not final and are always subject to enforcement and modification by the courts granting alimony, and such decrees cannot be enforced in a sister state or territory under the full faith and credit clause of the Constitution of the United States.

IV.

That defendant's demurrer is fully sustained by the law and the decisions of the courts.

For the reasons stated in the foregoing argument we maintain that the judgment of the District court for the Territory of Alaska sustaining defendant's demurrer to plaintiff's complaint was properly made and entered, and we, therefore, submit that an order should be entered sustaining the judgment of said court.

Respectfully submitted,

S. O. MORFORD,
Council for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. H. DUEHAY, Superintendent of Prisons of the Department of Justice, O. P. HALLIGAN, Warden of the United States Penitentiary, McNeil Island, Washington, and J. J. LEISER, Physician, United States Penitentiary, McNeil Island, Washington,

Plaintiffs in Error,

vs.

FRED H. THOMPSON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for the Western District of Washington,
Southern Division.

Filed

FEB 2 - 1915

(F. D. Monckton,
Clerk.)

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. H. DUEHAY, Superintendent of Prisons of the
Department of Justice, O. P. HALLIGAN,
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the Western District of Washington,
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Counsel.

CLAY ALLEN, Esquire, U. S. Attorney, Federal Building, Seattle, Washington.

GEORGE P. FISHBURNE, Esquire, Asst. U. S. Attorney, Federal Building, Tacoma, Washington.

Attorneys for the Plaintiff in Error, and
JOHN J. SULLIVAN, Esquire, L. C. Smith Building, Seattle, Washington.

Attorneys for Defendant in Error. [2*]

In the United States District Court for the Western District of Washington, Southern Division.

FRED H. THOMPSON,

Plaintiff and Defendant in Error,
vs.

F. H. DUEHAY, Superintendent, etc. et al.,
Defendants and Plaintiffs in Error.

Praecipe for Transcript.

To the Clerk of the Above-entitled Court:

You will please prepare and certify to constitute the record on appeal in the above cause, typewritten copies of the following papers, omitting all captions, verifications, acceptances of service and other endorsements, excepting file marks. I hereby waive the provisions of the Act of February, 1911, in reprinting of transcripts on appeal:

1. This Praecipe.
2. Complaint.
3. Answer.

*Page-number appearing at foot of page of original certified Record.

4. Order to Show Cause.
5. Decisions on Merits.
6. Order Extending Time to Take Appeal.
7. Stipulation and Order Extending Time to Appeal.
8. Findings of Fact, and
9. Conclusions of Law, and
10. Order on Foregoing.
11. Petition for Appeal.
12. Assignments of Error.
13. Order Allowing Appeal.

Dated this 16th day of November, A. D. 1914.

G. P. FISHBURNE,

Asst. U. S. Attorney.

“Filed in the U. S. District Court, Western District of Washington, Southern Division. Nov. 17, 1914. Frank L. Crosby, Clerk.” [3]

Complaint.

Comes now the plaintiff in the above-entitled action and complains and alleges:

I.

That F. H. Duehays is the Superintendent of Prisons of the Department of Justice; That O. P. Halligan is the Warden of the United States Penitentiary at McNeil Island, Washington; That J. J. Leiser is the Physician of the United States Penitentiary at McNeil Island, Washington.

II.

That on or about the 20th day of December, 1911, at the city of Los Angeles, State of California, and

in the United States District Court in and for the Southern Division of Southern California, your petitioner was convicted on two counts for receiving articles and things of value stolen from the United States mails in violation of Section 5470 of the Revised Statutes of the United States. That under and pursuant to the said judgment of conviction your petitioner was, by the Court, on or about the [4] third day of January, 1912, sentenced on the first of said counts to serve four years in the United States Penitentiary at McNeill Island, Washington, and to pay a fine of \$1,000.00; on the said second count was, by the Court, sentenced to serve four years in the said penitentiary and to pay a fine of \$1,000.00; said second sentence to commence at the expiration of the first of said sentences and to run consecutively to said first sentence.

III.

That on the 11th day of March, 1913, your petitioner did, under and pursuant to said judgment of conviction and said sentences enter the said penitentiary, and that your petitioner is now confined in said penitentiary.

IV.

That your petitioner after his conviction and sentences as aforesaid, made an application to the President of the United States for executive clemency. That on the 5th day of August, 1913, the President, having fully considered your petitioner's application for executive clemency and, after having been advised in the premises by the Attorney General of the United States, the Trial Judge and the District

Attorney who prosecuted your petitioner at his trial, and that the said officials and each and all of them having recommended to the President that your petitioner's case was a case where executive clemency should be granted, and the President being fully advised in the premises, believed that your petitioner's case was a case where executive clemency should be granted, and that parole on the then sentence would not afford him adequate relief, the President did on the said 5th day of August, 1913, issue his decree ordering and commuting your petitioner's two sentences to run concurrently instead of consecutively, and that your petitioner's two four-year sectences do now run concurrently. [5]

V.

That Congress on the 25th day of June, 1910, enacted an Act to Parole United States prisoners and for other purposes (S.870).

VI.

That the defendants under and by virtue of the terms of said Act compose and are the Parole Board for the said penitentiary.

VII.

That under and pursuant to said Act and the rules of said Parole Board approved by the Attorney General of the United States, all persons who are confined in the said penitentiary are permitted to apply for parole at the last regular meeting of the Parole Board held at said penitentiary prior to the time when they will have completed the total of the one-third of the term or terms of their sentence or sentences.

VIII.

That on July 10, 1914, your petitioner completed the total of one-third of the terms for which he was sentenced and that there accrued to him on the said 10th day of July, 1914, the right of parole.

IX.

That in the month of May, 1914, under and pursuant to the terms of the said Act the defendants, sitting as the Board of Parole for the said penitentiary, held a regular meeting for the considering of applications for parole of all prisoners confined in said penitentiary who would become eligible for parole under the said Act in the months of June, July and August, 1914.

That at the said meeting of the said Board your petitioner made an application to said Board for permission to file his application for a parole and to have the same considered by said Board.

That said Board refused to permit your petitioner to [6] to file his application for parole at the said meeting and refused to consider your petitioner's qualifications for a parole at the said meeting, for the reason, as your petitioner was informed by said Board, that they believed, under the terms of said Act, that your petitioner would not become eligible for parole until he had served a total of one-third of his original sentence, and that he would not become eligible for parole until November 9th, 1915.

X.

That the ruling of the said Board is unlawful, unjust, wrong and contrary to the terms of the said Act, and that unless your petitioner is granted relief

by this honorable Court your petitioner will be forced to wait in the said penitentiary until November 9, 1915, before he will be permitted the right of parole and that by reason of the erroneous, unlawful and wrongful ruling of said Board your petitioner will, unless granted relief by the Court, have to serve sixteen (16) months additional time in said penitentiary, and that your petitioner will be denied the equal rights, benefits and privileges of parole which is afforded to the other prisoners by the defendants herein.

XI.

That your petitioner has no plain, speedy or adequate remedy at law.

XII.

That your petitioner has conformed to all the rules and regulations of said penitentiary regarding the duty and obligations of prisoners and that he has not been punished or reprimanded for any misconduct or wrongful behavior.

XIII.

That the only reason for the refusal of the Parole Board to permit your petitioner to file his application for parole is the reason as aforesaid. [7]

XIV.

That your petitioner is without means to employ counsel or to pay the fees or necessary costs of court in this action.

XV.

That your petitioner is a native-born citizen of the United States and is entitled to all the rights accrued

to him under the former pauper's act, approved June 25, 1910. 36 Stat. 866.

WHEREFORE, your petitioner prays for an order of court that he may appear in *propria personam* to prosecute this action.

2d. That the necessary fees and costs of court be paid by the Government.

3d. That a writ of mandamus be issued by this Honorable Court commanding F. H. Duehay, the above-named defendant, to forthwith call a meeting of the Parole Board at McNeil Island and that the above-named defendants, and each of them, be commanded to forthwith receive your petitioner's application for parole and that the defendants, and each of them, be commanded forthwith to give your petitioner a fair, just and impartial hearing on his application for parole and that the above-named defendants, and each of them, be further commanded to forthwith do all and everything necessary to afford your petitioner full, complete any adequate relief.

4th. That the Court make and further order that it may deem necessary to afford your petitioner full and adequate relief.

FRED H. THOMPSON,
In Propria Personam.

State of Washington,
County of Pierce,—ss.

Fred. H. Thompson being duly sworn deposes and says, that he is the above-named plaintiff, that he has read the foregoing complaint, and that he knows the contents thereof and that the same is true excepting the facts stated on information and belief, and as

to those facts he believes them to be true.

FRED H. THOMPSON.

Subscribed and sworn to before me this — day of Sept. 1914.

[Seal] NEIL O. HENLY,
Notary Public Residing at Bee, County of Pierce,
State of Wash. [8]

Filed in the U. S. District Court, Western District of Washington, Southern Division. Sept. 29, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [9]

Answer.

Comes now the defendants in the above-entitled action, and as an answer to the Complaint of Plaintiff herein allege as follows:

I.

That they deny each and every allegation of the Plaintiff's Complaint save and except what is hereinafter specifically admitted:

II.

That they admit Paragraphs I, II, III, IV, V, VI, VII and IX.

CLAY ALLEN,
United States District Attorney.
G. P. FISHBURNE,
Assistant District Attorney.

"Filed in the U. S. District Court Western District of Washington, Southern Division. Oct. 30, 1914. Frank L. Crosby, Clerk." [10]

Order to Show Cause.

The Court having duly considered the complaint of the plaintiff in the above-entitled action and finding that the plaintiff therein is confined in the penitentiary and has no funds and that he desires to prosecute the action in his own person,

WHEREFORE, IT IS ORDERED:

1. That the action proceed in *forma pauperis* and that the necessary fees, costs and expenses of the action be paid by the United States.
2. That the above-entitled defendants appear on Monday, the 12th day of October, 1914, at 10 A. M., to show cause why a writ of mandamus should not be issued commanding the above-named defendants to receive the plaintiff's application for parole and give the plaintiff a fair hearing on his application for parole.
3. That the said defendant O. P. Halligan bring the prisoner before the Court to testify on his own behalf.

That a copy of this order together with a copy of the complaint be served on O. P. Halligan on behalf of all of the defendants.

Dated this 29th day of September, 1914.

EDWARD E. CUSHMAN,
Judge.

"Filed in the U. S. District Court, Western District of Washington, Southern Division. Sep. 29, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [11]

[Opinion.]

Decision, Filed October 31, 1914.

FRED H. THOMPSON, Petitioner—in Person.

CLAY ALLEN, United States Attorney—For Respondents.

GEO. P. FISHBURNE, Asst. United States Attorney—For Respondents.

CUSHMAN—District Judge.

This matter is before the Court, after evidence taken, upon petitioner's complaint and respondent's answer to the petition of relator for a writ of mandamus directing respondents, as the Board of Parole of McNeil Island Penitentiary, to receive the application of petitioner for parole and to give him a hearing thereon.

Petitioner was convicted upon an indictment in two counts and sentenced to four years imprisonment on each count—the sentences to run consecutively, not concurrently. That is, the second sentence to commence at the expiration of the first.

The President of the United States has commuted these sentences "to run concurrently." The Parole Act provides:

"That every prisoner who has been or may hereafter be convicted of any offense against the United States, and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, whose record of conduct shows he has observed the rules of such institution, and who

has served one-third of the total of the term or terms for which he was sentenced, may be released on parole as hereinafter provided."

"That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereinafter be provided by Act of Congress." [12]

(Secs. 1, 10, 36; Stat. L., pp. 819, 821; Fed. Stat. Ann., Supp. 1912, vol. 1, pp. 304, 306.)

Petitioner sought to file with the Board of Parole and have considered, his petition for parole, offered under the rules adopted regulating hearings by the Board. Petitioner sought parole at the expiration of one-third of the four-year period covered by these concurrent sentences; but was denied the right to file such application and denied a hearing thereon, the Attorney General for the Board, advising him:

"Please inform the prisoner that the Department does not agree with his conclusion that he is eligible to parole when he has served one-third of the commuted sentence. It is the view of the Department that he must serve one-third of his original sentence of eight years."

The respondents' claim is that the application for parole is premature; that the Board will not exercise its discretion and consider the application for that reason.

The act above quoted provides that "every prisoner * * * who has *served* one-third of the *total* of the term or terms for which he was sentenced may

be released on parole." Does "one-third of the total term or terms" mean that, for the purpose of the parole law, the sentence imposed is unaffected by the commutation—although such commuted sentence supersedes, alters, changes and substitutes the new term for that imposed by the original sentence for every other purpose—in determining the time at which the parole law can be invoked? Such a construction is too narrow.

The good time law provides:

"That each prisoner * * * shall be entitled to a deduction from the term of his sentence to be estimated as follows: * * * Upon a sentence of not less than six months nor more than one year, five days for each month; upon a sentence of more than one year and [13] less than three years, six days for each month; upon a sentence of not less than three years and less than five years, seven days for each month; upon a sentence of not less than five years and less than ten years, eight days for each month; upon a sentence of ten years or more, ten days for each month. When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated." (32 Stat. L., 397; Fed. Stat. Ann., vol. 6, pp. 40, 41.)

Upon the argument it was stated without question that, in applying the good time law, upon commutation of a sentence, the good time is calculated as from the beginning on the length of term of the sentence as commuted and not upon the sentence as originally imposed. This practice would, certainly, be more

consonant with reason than that now contended for under the parole law.

No difference in the language of the two acts appears to show a different intent in this regard. The language of the act is "who has served one-third of the total term or terms for which he was sentenced."

By the sentences imposed by the Court, the two four-year terms were to run consecutively. These sentences were commuted "to run concurrently," that is, to run together, the time served running together upon both sentences. If this be so, the petitioner has served one-third of the total terms for which he was sentenced. To decree otherwise is to impair the power of the President to grant a commutation of sentence.

As one judgment is entirely wiped out and another substituted for it upon a new trial or appeal, which substituted judgment is complete and entire in and of itself, and for all purposes the only judgment given effect, so does the commutation, in effect, write a new sentence,—the only sentence that remains effective from the beginning. To deny this is to hold that the President did not, in reality, commute the sentence [14] as imposed; that he only partly commuted it, only commuted it for certain purposes. That is to say, that, notwithstanding the decree of commutation, for one purpose, the sentences do not, and shall not run concurrently.

The parole law deals with substance, and not form, and the "total of the term or terms" of sentence means, the total of the time actually to be served. If such were not the fact, in the case of sentences on

three or more counts running concurrently, the parole law would have no effect, in spite of the fact that it provides that "every prisoner * * * may be released on parole."

If the President by his commutation finds that relief afforded by parole is not adequate, it would be more reasonable to contend that a commutation superseded the right of parole, and that no parole would be allowed, than to contend for a modification of the right of parole as to the time when it could be invoked.

By Section 10, above quoted, while the President's power to commute is fully recognized, no intent or purpose is shown but that the parole law is fully subject, in its operation, thereto. No intention is shown in the law that the advantages of the parole law and commutation are only to be allowed in the alternative.

By this contention, that particular feature of the sentence which was modified by the commutation is qualified so as to give to the commuted sentence a different effect than is given to a sentence originally imposed to run concurrently by the Court. There is no more reason to suppose that a sentence of imprisonment is imposed without regard to the possibility [15] of commutation, than that it is pronounced without consideration of the opportunity afforded the prisoner to earn good time or parole.

The President's power to commute is conferred upon him by the Constitution and cannot be affected by legislative action, or impaired or undermined in any particular.

However, whether a pardon or commutation be considered as the executive of justice in mercy, or as an act of grace it is the substitution of something better for that which was. Then how can it be said, in effect, that that which is right should give way to that which is relatively wrong?

The prisoner has served one-third of the total sentences imposed. To argue otherwise is to attribute to the Act of Congress an intent to deny full effect to the action of the Executive, a thing not to be presumed in the absence of language conclusively showing such purpose and of doubtful effect, even if intended.

Ex parte Garland, 4 Wall. 333, at 380;

Ex parte William Wells, 19 How. 307;

United States vs. Wilson, 7 Pet. *150.

The writ of *mandamus* will issue, unless, within ten days, an appeal is taken.

“Filed in the U. S. District Court, Western District of Washington, Southern Division. Oct. 31, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.” [16]

Findings of Fact and Conclusions of Law.

This cause having come on to be heard, plaintiff appearing in person, and by and through his attorney, John J. Sullivan, with permission of the Court, and the Court being fully advised in the premises and the law, and upon the files and records in this cause, makes the following

FINDINGS OF FACT.

I

That F. H. Duehay is the Superintendent of Prisons of the Department of Justice; that O. P. Halligan is the Warden of the United States Penitentiary at McNeil Island, Washington; that J. J. Leiser is the physician of the United States Penitentiary at McNeil Island, Washington.

II.

That on or about the 20th day of December, 1911, at the city of Los Angeles, State of California, in the United States District Court in and for the Southern Division of Southern California, plaintiff was convicted on two counts for receiving articles and things of value stolen from the United States mails, in violation of Section 5470 of the Revised Statutes of the United States; that under [17] and pursuant to the said judgment of conviction plaintiff was, by the Court, on or about the 3d day of January, 1912, sentenced on the first of said counts to serve four years in the United States Penitentiary at McNeil Island, Washington, and to pay a fine of \$1,000.00; on the said second count plaintiff was, by the Court, sentenced to serve four years in the said penitentiary and to pay a fine of \$1,000.00; said second sentence to commence at the expiration of the first of said sentences and to run consecutively to said first sentence.

III.

That on the 11th day of March, 1913, plaintiff did, under and pursuant to said judgment of conviction and said sentences, enter said penitentiary, and that plaintiff is now confined in said penitentiary.

IV.

That plaintiff, after his conviction and sentences, as aforesaid, made application to and did receive from the President of the United States, executive clemency, in that the said President of the United States, on the 5th day of August, 1913, issued his decree ordering and commuting plaintiff's two sentences to run concurrently, instead of consecutively, and that plaintiff's two four-year sentences do now run concurrently.

V.

That Congress on the 25th day of June, 1910, enacted an Act to Parole United States Prisoners and for Other Purposes (S. 870).

VI.

That the defendants under and by virtue of the terms of said Act compose and are the Parole Board for the said penitentiary.

VII.

That under and pursuant to said Act and the rules of said Parole Board approved by the Attorney General of the United States, all persons who are confined in the said penitentiary are permitted to apply for parole at the last regular meeting of the Parole Board, held at said penitentiary prior to the time when they will have completed [18] the total of the one-third of the term or terms of their sentence or sentences.

VIII.

That on the 10th day of July, 1914, plaintiff completed the total of one-third of the terms as commuted

by the President; that is to say, one-third of four years.

IX.

That in the month of May, 1914, the defendants, sitting as the Parole Board of the said penitentiary, held a regular meeting for the purpose of considering the applications for parole of all prisoners confined in said penitentiary who would be eligible for parole under the said Act in the months of June, July and August, 1914; that at said meeting of the said Parole Board, plaintiff made application to said Board for permission to file his application for a parole and to have same considered by said Board; that said Parole Board refused to permit plaintiff to file his application for parole at said meeting, and refused to consider plaintiff's qualifications for a parole, for the reason that the Attorney General had ruled that plaintiff would not become eligible for parole until he had served one-third of his original sentence, and that he would not become eligible for parole until November 9th, 1915.

X.

That under the ruling of the Parole Board and the Attorney General, plaintiff would be compelled to remain in the penitentiary until November 9th, 1915, before he would be permitted, under said construction of the meaning of the Parole Act, to have the right of parole.

XI.

That plaintiff has conformed to all the rules and regulations of said penitentiary regarding the duty and obligations of prisoners, and that he has not been

punished or reprimanded for any misconduct or wrongful behavior, and that the only reason for the refusal of said Parole Board to file his application, was the said ruling of the Attorney General. [19]

XII.

That plaintiff is a native-born citizen of the United States and is entitled to all the rights accruing to him under the form of pauper's act, approved June 25th, 1910. (36 Stat. 866.)

XIII.

That the action was tried by the Court, a jury having been waived on account of the fact that there were no questions of fact in dispute, and only questions of law.

Dated Nov. 16, 1914.

EDWARD E. CUSHMAN,
Judge of said Court.

IT IS HEREBY STIPULATED AND AGREED
that the above were the facts in the above-entitled
action.

Dated November 11th, 1914.

JOHN J. SULLIVAN,
Attorney for Plaintiff.

CLAY ALLEN,
G. P. FISHBURNE,
Attorneys for Defendant.

From the foregoing FINDINGS OF FACT the
Court makes the following:

CONCLUSIONS OF LAW.

I.

That the President's power to commute is con-
ferred upon him by the Constitution, and cannot be

affected by legislative action, or impaired or undermined in any particular.

II.

That a commutation of sentence by the President is to be considered as a substitution of something better for that which was, and that the act of the President in commuting plaintiff's sentence of four years on each count, running consecutively, to that of four years on each count, running concurrently, substitutes the commuted sentence for the sentence originally imposed by the Court.

III.

That the plaintiff, having served one-third of the term of his commuted sentence, has served one-third of the term to which he was sentenced, and is, therefore, entitled to a hearing for parole.

Signed this 16th day of November, 1914.

EDWARD E. CUSHMAN,

Judge. [20]

. Order [Directing Issuance of Writ of Mandamus, etc.].

This cause having come on to be heard, plaintiff appearing in person, and by and through his attorney, John J. Sullivan, with permission of the Court, and the Court being fully advised in the premises and the law, and upon the files and records in this cause, and having made its FINDINGS OF FACT and CONCLUSIONS OF LAW, makes the following ORDER.

1. That a writ of *mandamus* be issued, under seal of this Court, commanding F. H. Duehay, one of the

above-named defendants, to call a meeting of the Parole Board at McNeil Island, and that the above-named defendants, and each of them, be commanded to forthwith receive Fred H. Thompson's application for a parole, and the said defendants, and each of them, are hereby commanded to forthwith at said hearing give the said plaintiff, Fred H. Thompson, a fair, just and impartial hearing on his application for a parole.

2. The above-named defendants, and each of them, are hereby further commanded to do everything necessary to afford the plaintiff just and adequate relief in the premises.

Dated this 16th day of November, 1914.

EDWARD E. CUSHMAN,

Judge. [21]

"Filed in the U. S. District Court, Western District of Washington, Southern Division. Nov. 16, 1914. Frank L. Crosby, Clerk." [22]

Order Extending Time to Take Appeal [to November 12, 1914].

The attorneys on both sides of the above-entitled action having consented that the time for taking appeal in the said action be extended from the 10th day of November, 1914, to and including Thursday, the 12th day of November, 1914;

WHEREFORE IT IS ORDERED that the time for taking the appeal in the above-entitled action be and is hereby extended to and including Thursday, the 12th day of November, 1914.

Done in open court this 10th day of November, 1914.

EDWARD E. CUSHMAN,
Judge.

"Filed in the U. S. District Court, Western District of Washington, Southern Division. Nov. 9, 1914.

FRANK L. CROSBY,
Clerk.

By F. M. Harshberger,
Deputy. [23]

**Stipulation and Order Extending Time to Take
Appeal [to November 17, 1914].**

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and defendants in the above-entitled cause, that the time for taking the appeal by the defendants be, and the same is hereby extended to Tuesday, November 17th.

JOHN J. SULLIVAN,
Attorney for Plaintiff.

CLAY, ALLEN & G. P. FISHBURNE,
Attorneys for Defendants.

It is ordered that the time for taking the appeal in the above-entitled action be and the same is hereby extended to and including Tuesday, November 17, 1914, and writ of mandate stayed in the meantime.

Dated this 12th day of November, 1914.

EDWARD E. CUSHMAN,
Judge.

"Filed in the U. S. District Court, Western Dis-

trict of Washington, Southern Division. Nov. 12, 1914.

FRANK L. CROSBY,
Clerk.
By F. M. Harshberger,
Deputy." [24]

Petition for Writ of Error.

The above-named respondents conceiving themselves aggrieved by the decision filed the 31st day of October, 1914, and the conclusions of law and the order dated and entered the 16th day of November, 1914, in the above-entitled cause, hereby pray the court for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit in said cause and that a transcript of the records, proceedings and papers on which said decision and judgment were made and entered, duly authenticated, may be sent to the said Circuit Court of Appeals of the United States for the Ninth Circuit.

Dated at Tacoma, Washington, this 16th day of November, 1914.

CLAY ALLEN,
G. P. FISHBURNE,

Attorneys for Respondents and Plaintiffs in Error.

The writ of error prayed for in the above cause be and is hereby granted this 16th day of November, 1914.

EDWARD E. CUSHMAN,
District Judge Residing in said District and Presiding Over said Court. [25]
"Filed in the U. S. District Court, Western Dis-

trict of Washington, Southern Division. Nov. 6, 1914.

FRANK L. CROSBY,
Clerk.

By E. C. Ellington,
Deputy." [26]

Assignments of Error.

Come now F. H. Duehay, Superintendent of Prisons of the Department of Justice, O. P. Halligan, Warden of the United States Penitentiary, McNeil Island, Washington, J. J. Leiser, Physician, United States Penitentiary, McNeil Island, Washington, respondents and plaintiffs in error, and Clay Allen and G. P. Fishburne, their attorneys, and say that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

That the Court erred in making Conclusion of Law II.

II.

That the Court erred in making Conclusion of Law III.

III.

That the Court erred in rendering its decision filed October 31, 1914. [27]

IV.

That the Court erred in making the order dated and filed November 16, 1914.

V.

That the Court erred in not holding that the petitioner could not be eligible to parole until he had

served one-third of the term as originally imposed, to wit: Eight years.

VI.

That the Court erred in holding that one-third of the total of the "term or terms for which he was sentenced" meant one-third of the term of the petitioner as commuted by the President, and in not holding that the words "term or terms" used in the statute referred to the original sentence imposed by the Court, to wit, eight years.

VII.

That the Court erred in not dismissing the complaint of the petitioner herein,

WHEREFORE the said respondents, F. H. Duehay, Superintendent of Prisons of the Department of Justice, O. P. Halligan, Warden of the United States Penitentiary, McNeil Island, Washington, J. J. Leiser, Physician United States Penitentiary McNeil Island, Washington, pray that the decision, order and judgment of the said District Court for the Western District of Washington, Southern Division, be in all things reversed.

CLAY ALLEN,

G. P. FISHBURNE,

Attorneys for Respondents and Plaintiffs in Error.

[28]

"Filed in the U. S. District Court, Western District of Washington, Southern Division. Nov. 16, 1914.

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy." [29]

Writ of Error [Copy].

United States of Americt, the President of the United States of America, to the Honorable Judge of the District Court of the United States for the Western District of Washington, Southern Division, Greeting:

Because in the record and proceedings as also in the rendition of the decree and judgment of a cause which is in the above-entitled court before you between Fred H. Thompson, petitioner and defendant in error, and F. H. Duehay, Superintendent of Prisons of the Department of Justice, O. P. Halligan, Warden of the United States Penitentiary, McNeil Island, Washington, J. J. Leiser, Physician, United States Penitentiary, McNeil Island, Washington, respondents and plaintiffs in error, a manifest error hath happened to the damage of the said plaintiffs in error as by their answer and the record herein appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties [30] aforesaid in this behalf, do command you under your seal distinctly and openly that you send the records and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit together with this writ so that you have the same at San Francisco, California, in said Circuit on thirty days from the date of this writ in the said Circuit Court of Appeals, that the record and proceedings aforesaid being exhibited, the said Circuit Court of Appeals may cause further to be done therein to correct that error what by right and ac-

cording to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 16th day of November, 1914.

FRANK L. CROSBY,
Clerk of District Court of the United States for
Western District of Washington, Southern Di-
vision.

By E. C. Ellington,
Deputy Clerk.

Approved this 16th of November, 1914.

EDWARD E. CUSHMAN,
United States District Judge Presiding in the Above-
entitled Court.

Due and legal service of the within Writ of Error hereby acknowledged this —— day of November, 1914.

Attorneys for Fred H. Thompson, Defendant in
Error.

“Filed in the U. S. District Court, Western Dis-
trict of Washington, Southern Division. Nov. 16,
1914.

FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy.” [31]

Citation [on Writ of Error].

United States of America, the President of the United States of America to Fred H. Thompson, Defendant in Error, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court in the City of San Francisco and State of California, within thirty days from the date of this citation; to wit, within thirty days from November 16, 1914, pursuant to writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein F. H. Duehay, Superintendent of Prisons of the Department of Justice, O. P. Halligan, Warden of the United States Penitentiary, McNeil Island, Washington, and J. J. Leiser, Physician, United States Penitentiary, McNeil Island, Washington, are plaintiffs in error, and Fred H. [32] Thompson is defendant in error, to show cause, if any there be, why the decision and judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 16th day of November, 1914.

Judge of District Court of the United States for Western District of Washington, Southern Division.

Due and legal service of the within Citation hereby acknowledged this — day of November, 1914.

Attorneys for Fred H. Thompson, Defendant in Error.[33]

[**Certificate of Clerk U. S. District Court to Transcript of Record.]**

United States of America,
Western District of Washington,—ss.

I, FRANK L. CROSBY, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the above-entitled cause as the same remains of record and on file in my office in said district at Tacoma, and that the same constitutes the return on the annexed Writ of Error.

I further certify that I attach hereto and herewith transmit the original Writ of Error, original Citation, and original Order Extending Time on Writ of Error, original Exhibits "A" and "B" and No. 1.

I further certify that the following is a full, true and correct statement of all expenses, costs and fees, and charges incurred and paid in my office by and on behalf of the Plaintiff in Error, for making record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit;

Clerk's fees, (See 828 R. S. U. S. as amended
for making record, certificate or return 52
folios @ 30¢\$15.60

Certificate of Clerk to transcript of record, etc.

2 folios @ 30¢.....	.60
Seal to said certificate.....	.40

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said district court, at Tacoma, in said district, this 28th day of December, [34] A. D. 1914.

FRANK L. CROSBY,
Clerk.

[Seal]

By E. C. Ellington,
Deputy Clerk. [35]

United States Circuit Court of Appeals for the Ninth Circuit.

No. —.

FRED H. THOMPSON,

Petitioner and Defendant in Error,
vs.

F. H. DUEHAY, Superintendent of Prisons of the Department of Justice; O. P. HALLIGAN, Warden of the United States Penitentiary, McNeil Island, Washington; J. J. LEISER, Physician, United States Penitentiary, McNeil Island, Washington,

Respondents and Plaintiffs in Error.

Writ of Error (Original)].

United States of America, the President of the United States of America to the Honorable Judge of the District Court of the United States for the Western District of Washington, Southern Division, Greeting:

Because in the record and proceedings as also in the rendition of the decree and judgment in the cause which is in the above-entitled court before you between Fred H. Thompson, petitioner and defendant in error, and F. H. Duehay, Superintendent of Prisons of the Department of Justice, O. P. Halligan, Warden of the United States Penitentiary, McNeil Island, Washington, J. J. Leiser, Physician, United States Penitentiary, McNeil Island Washington, respondents and plaintiffs in error, a manifest error hath happened to the damage of the said plaintiffs in error as by their answer and the record herein appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties [36] aforesaid in this behalf, do command you under your seal distinctly and openly that you send the records and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit together with this writ so that you have the same at San Francisco, California, in said Circuit on thirty days from the date of this writ in the said Circuit Court of Appeals, that the record and proceedings aforesaid being exhibited, the said Circuit Court of Appeals may cause further to be done therein to correct that error what by right and according to law and custom of the United States ought to be done.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the

United States, this 16th day of November, 1914.

FRANK L. CROSBY,

Clerk of District Court of the United States for
Western District of Washington, Southern Di-
vision.

By E. C. Ellington,
Deputy Clerk.

Allowed this 16th day of November, 1914.

EDWARD E. CUSHMAN,

United States District Judge Presiding in the Above-
entitled court.

Due and legal service of the within Writ of Error
hereby acknowledged this —— day of November,
1914.

Attorneys for Fred H. Thompson, Defendant in
Error. [37]

[Endorsed]: No. ——. United States Circuit
Court of Appeals for the Ninth Circuit. Fred H.
Thompson, Petitioner and Defendant in Error, vs.
F. H. Duehay, Superintendent, etc., et al., Respond-
ents and Plaintiffs in Error. Writ of Error. Filed
in the U. S. District Court, Western Dist. of Wash-
ington, Southern Division. Nov. 16, 1914. Frank
L. Crosby, Clerk. By E. C. Ellington, Deputy. [38]

*United States Circuit Court of Appeals for the Ninth
Circuit.*

No. 1659.

FRED H. THOMPSON,

Petitioner and Defendant in Error,

vs.

F. H. DUEHAY, Superintendent of Prisons of the Department of Justice; O. P. HALLIGAN, Warden of the United States Penitentiary, McNeil Island, Washington; J. J. LEISER, Physician, United States Penitentiary, McNeil Island, Washington,

Respondents and Plaintiffs in Error.

Citation [on Writ of Error (Original)].

United States of America, the President of the United States of America to Fred H. Thompson, Defendant in Error, Greeting:

You are cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the courtroom of said court in the City of San Francisco and State of California within thirty days from the date of this citation, to wit, within thirty days from November 16, 1914, pursuant to writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein F. H. Duehay, Superintendent of Prisons of the Department of Justice, O. P. Halligan, Warden of the United States Penitentiary, McNeil Island, Washington, and J. J. Leiser, Physician, United States

Penitentiary, McNeil Island, Washington, are plaintiffs in error, and Fred H. [39] Thompson is defendant in error, to show cause, if any there be, why the decision and judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, this 16th day of November, 1914.

EDWARD E. CUSHMAN,
Judge of District Court of the United States for
Western District of Washington, Southern Division,

Due and legal service of the within Citation hereby acknowledged this 16th day of November, 1914.

JOHN J. SULLIVAN,
Attorneys for Fred H. Thompson, Defendant in
Error.

Received a copy of the Petition for Writ of Error, assignments of error, order allowing writ and writ of error this 16th day of November, 1914.

JOHN J. SULLIVAN,
Attorneys for Fred H. Thompson, Defendant in
Error. [40]

[Endorsed]: Original. No. —. United States Circuit Court of Appeals for the Ninth Circuit. Fred H. Thompson, Petitioner and Defendant in Error, vs. F. H. Duehay, Superintendent, etc., et al., Respondents and Plaintiffs in Error. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Nov. 16, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy.

[**Marshal's Return on Service of Citation on Writ of Error, etc.]**

United States of America,
Western District of Wash.—ss.

I hereby certify and return that I served the annexed Citation together with Petition for Writ of Error, Assignment of Error and Writ of Error on the therein-named Fred H. Thompson by handing to and leaving true and correct copies thereof with John J. Sullivan, Esq., Atty. for Fred H. Thompson, Petitioner, personally at Seattle, in said District on the 16th day of Nov., A. D. 1914.

JOHN M. BOYLE,
U. S. Marshal.
By H. V. R. Anderson,
Deputy.

Marshal's fees, \$2.12. [41]

[**Order Extending Time to File Record in Appellate Court to January 16, 1915.]**

In the United States Circuit Court of Appeals, for the Ninth Judicial Circuit.

F. H. DUEHAY, Superintendent, etc., et al.,
Defendant and Plaintiff in Error,
vs.

FRED H. THOMPSON,
Plaintiff and Defendant in Error.

For good cause shown, IT IS NOW ORDERED that the time within which the Record and Return on Writ of Error in the above case may be filed in this

court at San Francisco, California, be and the same is hereby extended to and including the 16th day of January, A. D. 1915.

Dated this 12th day of December, A. D. 1914.

EDWARD E. CUSHMAN,

U. S. District Judge. [42]

[Endorsed]: No. ——. In the U. S. Circuit Court of the United States for the Ninth Circuit. Thompson, Defendant in Error, vs. Duehay, Supt. etc. et al., Plaintiffs in Error. Order Extending Time. Filed in the U. S. District Court. Western Dist. of Washington, Southern Division. Dec. 12, 1914. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. G. O. B. 128. [43]

[Endorsed]: No. 2533. United States Circuit Court of Appeals for the Ninth Circuit. F. H. Duehay, Superintendent of Prisons of the Department of Justice; O. P. Halligan, Warden of the United States Penitentiary, McNeil Island, Washington; and J. J. Leiser, Physician, United States Penitentiary, McNeil Island, Washington, Plaintiffs in Error, vs. Fred H. Thompson, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filed December 31, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul T. O'Brien,

Deputy Clerk.

[Plaintiff's Exhibit "A"—Order of President of United States Commuting Sentences, etc.]

WOODROW WILSON.

President of the United States of America.

To All to Whom These Presents Shall Come, Greeting:

WHEREAS, Fred H. Thompson was convicted in the United States District Court for the Southern District of California of receiving articles stolen from the mails,—two counts,—and on January third, 1912, was sentenced on each count to pay a fine of one thousand dollars and to be imprisoned for four years in the United States Penitentiary at McNeil Island,—sentence on the second count to commence on expiration of the first sentence; and,

Whereas, the case was taken on a writ of error to the Circuit Court of Appeals, Ninth Circuit, which court affirmed the judgment and sentence, February third, 1913; and,

Whereas, it has been made to appear to me that the said Fred H. Thompson is a fit object of executive clemency:

Now, therefore, be it known, that I, WOODROW WILSON, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby commute the sentences of the said Fred H. Thompson to run concurrently,—the fines to remain.

In testimony whereof, I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

Done at the City of Washington this fifth day of August, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States the one hundred and thirty-eighth.

[Seal] WOODROW WILSON,
By the President:

J. C. McReynold,
Attorney General.

[Endorsed]: Case No. 1659. United States District Court, Western District of Washington. Fred H. Thompson vs. F. H. Duehay et al. Plaintiff's Exhibit "A." Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 19, 1914. Frank L. Crosby, Clerk. By _____, Deputy. [44]

[Plaintiff's Exhibit "B"—Rules Relating to Application for Pardon.]

RULES RELATING TO APPLICATIONS FOR PARDON.

Department of Justice.

Washington, D. C., March 29, 1913.

1. All applications for pardon should be signed by two or more credible persons, be addressed to "The President of the United States," and be forwarded under cover to "The Attorney General" (except applications for pardon for desertion or other offenses against the military or naval laws, which should be addressed to the Secretary of War and the Secretary of the Navy, respectively), and the post-office address

of each person signing the application should be plainly stated. It is desirable that the petitioner should sign the application or in some way indicate his approval of the petition. When several petitions are filed in the same case, the applicant's approval of one of the petitions is sufficient.

2. The petition should state the name of the applicant, his age, where born, previous occupation, *place of residence*, the crime of which he was convicted, the Court, District, State, the sentence, date of sentence, the penitentiary or prison to which he was sentenced, and the grounds upon which pardon is asked. (See also Rule 12.) It is not necessary to furnish a copy of the indictment or other court papers.

3. When an application is received, it is referred at once, with the accompanying papers, to the United States Attorney for the District where the trial took place, with direction to submit his report and recommendation thereon, sending the statement of his predecessor when he did not himself appear in the case, and the statement of any special attorney for the Government who took part in the trial. He is also directed to obtain, if possible, the views of the trial Judge, and to fill out and return a blank form of docket entries, from which the warrant of pardon may be prepared. Reports are also secured from the appropriate officers of the several Executive departments, and from the Warden and Prison Physician in regard to the prisoner's conduct and physical condition.

4. A case once referred for reports will not be again referred without a written request from the

United States Attorney or the trial Judge; and a case once acted upon by the President will not be reopened, except upon the presentation of new and material facts.

5. When none of the persons so consulted advises clemency, the papers are not sent to the President except by his special request, or by special order of the Attorney General; but when any one of the officers consulted advises clemency the papers are submitted to the President.

6. As all applications for Executive clemency are sent to the United States Attorneys for report and docket entries, it is unnecessary and undesirable for applicants to apply to the Attorney or Judge, except in Alaska. (See Rule 14.)

7. Reports to the President by United States Attorneys, Judges, and other officials, on application for pardon, are treated as confidential, and are not open to inspection by the applicant or by any other person, except with the written assent of the Attorney, Judge, or official making the report, nor, if such assent be given, unless it be shown that the ends of justice require the disclosure. All other papers, except reports or communications to the President by officials, are open to inspection by the applicant and his attorney or representative, and by Members of Congress.

8. Applications and accompanying papers can not be withdrawn after they have been referred to the United States Attorney, unless copies thereof are provided by the applicant, at his own expense, for the files of the Department. Action will be withheld, however, by request of the petitioner or his attorney

at any time before the case has been sent to the President.

(Put in evidence.)

9. Applications will not be considered pending appeals from judgments of conviction; nor shortly before the expiration of sentence, except in unusually urgent and meritorious cases. Petitions for pardon should be filed sufficiently in advance of the expiration of sentence to enable the Attorney in Charge of Pardons to secure the necessary reports and to brief the case, and to allow the Attorney General ample time to consider the application and make his report and recommendation thereon to the President.

10. Petitions for pardon made merely for the purpose of restoring the applicant to full civil rights will not be considered by the President before expiration of sentence; but after the prisoner has been released for not less than *two years*, such an application may be filed. Frequently, however, a much longer period is required before favorable action is taken, dependent largely upon the nature of the offense and the character of the applicant both before and since his conviction. In cases of violation of a public trust involving personal dishonesty, five years' probation is usually required. All applications for pardon to restore civil rights must, in addition to the requirements of Rule 2, *state the present address of the petitioner, and be accompanied by affidavits from at least three reputable citizens among whom the petitioner lives*, stating that since his release from prison he has conducted himself in a moral and law-abiding manner, what his occupation has been, and what

knowledge they have in the premises.

11. When the President has acted, the applicant or his attorney is notified of the result. If pardon is granted, a warrant is at once prepared and sent to the applicant, either through the United States Marshal or the officer in charge of the place of imprisonment.

12. Applications for Executive clemency will not be considered where adequate relief may be obtained by parole. Neither will applications for pardon or commutation of sentence by life prisoners be entertained shortly before the period when they will be eligible to release on parole, to wit, at the expiration of fifteen years' actual imprisonment. Each applicant for clemency should state why he does not apply for parole and why a release thereunder would not substantially meet the requirements in his case. Applications for pardon are not entertained while prisoners are on parole.

13. The President's power to pardon does not extend to offenses against State or Territorial laws. Applications of this character should be sent to the Governor or Board of Pardons of the State or Territory where the offense was committed.

14. Applications for pardon for offenses committed in Alaska should be addressed to the President of the United States and be presented to the United States Attorney for the District in which the offense was committed, which officer will secure the necessary reports, mentioned in Rule 3, and forward the same, together with the docket entries and the petition and accompanying papers, to the Attorney General.

Rule 13 does not apply to Alaska, as the laws governing that Territory are enacted by Congress and not by a Territorial legislature.

15. It is also permissible, where the exigencies of a case require it, for a United States Attorney to submit his report and recommendation, together with the other reports he is required to secure, in advance of, and without a definite request from, the Attorney General; but in every such instance the docket entries should also be inclosed. (See Rule 3.)

JAMES C. McREYNOLDS,
Attorney General.

[Endorsed]: Case No. 1659. United States District Court, Western District of Washington. Fred H. Thompson vs. F. H. Duehay et al. Plaintiff's Exhibit "B."

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 19, 1914. Frank L. Crosby, Clerk. By _____, Deputy.

[Defendant's Exhibit No. 1—Letter, Dated February 2, 1914, Assistant Attorney General to Warden, U. S. Penitentiary.]

Department of Justice United States Penitentiary,
McNeil Island, Washington.

Copy. McG—WWD.

Bee, Wash.,

DEPARTMENT OF JUSTICE.
WASHINGTON, D. C.

February 2, 1914.

Mr. O. P. Halligan,
Warden U. S. Penitentiary,
McNeil Island Washington.

Sir:—

The department is in receipt of a letter of the 12th instant from Fred H. Thompson, a prisoner in your institution, presenting arguments as to why he should be eligible for parole when he has served one-third of four years. It appears that the prisoner was sentenced to serve four years each on two counts, the sentences to run consecutively and that subsequently the President commuted the sentence so that the terms would run concurrently.

Please inform the prisoner that the Department does not agree with his conclusion that he is eligible to parole when he has served one-third of the commuted sentence. It is the view of the Department

that he must serve one-third of his original sentence of eight years.

Respectfully,
For the Attorney General,
(Signed) ERNEST KNAEBEL,
Assistant Attorney General.

[Endorsed]: Case No. 1659. United States District Court, Western District of Washington. Fred H. Thompson vs. F. H. Duehay et al. Defendant's Exhibit No. 1.

Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 19, 1914. Frank L. Crosby, Clerk. By —————, Deputy.

IN THE
**United States Circuit Court
of Appeals**
FOR THE
NINTH CIRCUIT

F. H. DUEHAY, Superintendent of
Prisons of the Department of Justice,
O. P. HALLIGAN, Warden
of the United States Penitentiary,
McNeil Island, Washington, and
J. J. LEISER, Physician, United
States Penitentiary, McNeil Isl-
and, Washington,

} No. 2533.

Plaintiffs in Error,

vs.

FRED H. THOMPSON,

Defendant in Error.

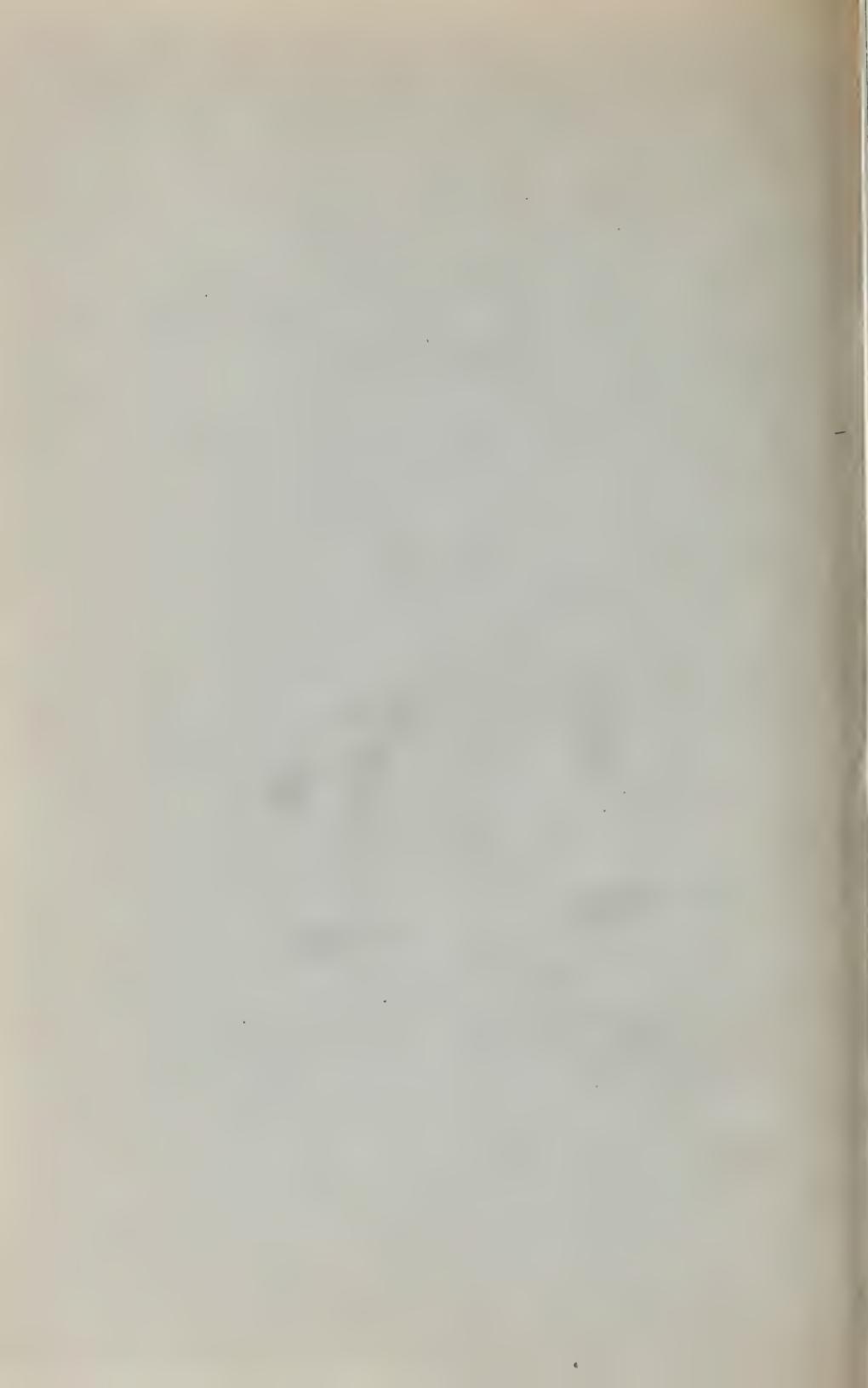
UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, SOUTHERN
DIVISION.

Brief of Plaintiffs in Error

CLAY ALLEN,
United States Attorney,

G. P. FISHBURNE,
Assistant United States Attorney.

Seattle, Washington.



IN THE
**United States Circuit Court
of Appeals**
FOR THE
NINTH CIRCUIT

F. H. DUEHAY, Superintendent of
Prisons of the Department of Justice,
O. P. HALLIGAN, Warden
of the United States Penitentiary,
McNeil Island, Washington, and
J. J. LEISER, Physician, United
States Penitentiary, McNeil Isl-
and, Washington,

No. 2533.

Plaintiffs in Error,

vs.

FRED H. THOMPSON,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED
STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASH-
INGTON, SOUTHERN
DIVISION.

Brief of Plaintiffs in Error

STATEMENT OF FACTS.

This matter was before the lower court, after
evidence taken, upon petitioner's complaint and

respondents' answer to the petition of relator for a writ of mandamus directing respondents, as the Board of Parole of McNeil Island Penitentiary, to receive the application of petitioner for parole and to give him a hearing thereon.

Petitioner was convicted upon an indictment in two counts and sentenced to four years imprisonment on each count—the sentences to run consecutively, not concurrently. That is, the second sentence to commence at the expiration of the first.

The President of the United States has commuted these sentences "to run concurrently". The parole act as amended provides:

"That every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided."

"That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereafter be provided by Act of Congress." Sec. 10, 36 Stat. L., p. 821; Fed. Stat. Annot., Supp. 1912, Vol. 1, p. 306.

Petitioner sought to file with the Board of Parole and have considered, his petition for parole, offered under the rules adopted regulating hearings by the Board. Petitioner sought parole at the expiration of one-third of the four-year period covered by these concurrent sentences; but was denied the right to file such application and denied a hearing thereon, the Attorney General for the Board, advising him:

"Please inform the prisoner that the Department does not agree with his conclusion that he is eligible to parole when he has served one-third of the commuted sentence. It is the view of the Department that he must serve one-third of his original sentence of eight years."

The respondent and appellant claims that petitioner is not entitled to parole and further that if he were at all entitled to parole the application therefor is premature.

See Transcript of Record, pages 15-19.

ASSIGNMENTS OF ERROR.

The assignments of error are as follows, to-wit:

I.

That the court erred in making Conclusion of Law II.

II.

That the court erred in making Conclusion of Law III.

III.

That the court erred in rendering its decision filed on October 31, 1914.

IV.

That the court erred in making the order dated and filed November 16, 1914.

V.

That the court erred in not holding that the petitioner could not be eligible to parole until he had served one-third of the term as originally imposed, to-wit: Eight years.

VI.

That the court erred in holding that one-third

of the total of the “term or terms for which he was sentenced” meant one-third of the term of the petitioner as commuted by the President, and in not holding that the words “term or terms” used in the statute referred to the original sentence imposed by the court, to-wit: Eight years.

VII.

That the court erred in not dismissing the complaint of the petitioner herein.

CONFINED IN EXECUTION OF JUDGMENT OF CONVICTION.

As a condition precedent to eligibility to parole the prisoner must be confined in execution of a judgment of conviction. The judgment of conviction is the sentence imposed by the court. The Executive, the President, has nothing to do with it. The commuted sentence of the President is not the sentence imposed by the court. The nature and definition of commutation show this. Thus in 29 Cyc, 1561, the definition is as follows:

“Commutation of sentence or punishment is the change of a punishment to which a person has been condemned to a less severe one.”

Another good definition will be found in *Rapalje & L. Dict.*, which is quoted with approval in *State vs. State Bd. of Corrections*, 16 Utah 478, 482, 52 Pac. 1090, and is as follows:

“Substitution of a lesser grade of punishment for that inflicted by the sentence pronounced upon conviction.”

And again it is well defined in the case of *Ogle-tree vs. Dozier*, 59 Ga. 800, 802, as follows:

“Change from a higher to a lower punishment.”

To illustrate further their marked difference a life sentence is an indeterminate sentence and may be commuted to a term of years, or again a death sentence may be commuted to a life sentence. This change cannot be said to have entered the mind of any one but the Executive, and when the prisoner is serving the sentence as commuted, he is serving something of which the Executive alone is the author and creator. Moreover, by commutation the Executive can impose a penalty for a crime which the courts had not the right or the power to inflict in the first instance.

Thus in *Ex Parte Harlan*, 180 Fed. 119, at page 127, it is said:

"Here, the punishment fixed was imprisonment in the penitentiary for a certain time, and it is changed to imprisonment there for a less time. The original sentence to the penitentiary being lawful, and the President having the power to shorten the length of imprisonment without otherwise interfering with it, the execution of the commuted sentence in the penitentiary cannot be unlawful merely because the statutes do not authorize the courts, in fixing the punishment in the first instance, to inflict imprisonment in the penitentiary for so short a time."

MEANING OF "SENTENCE".

The statute further provides "That every prisoner who * * * is confined in execution * * * in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life * * * and who if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced * * *. " The word "sentence" as above used clearly refers to that fixed by the court, to-wit: "the judgment of conviction", and the words "a term or terms" clearly mean those fixed by the court. This is conceded to be true and is acted on as true, but the defendant endeavors to stretch the meaning of the above quoted words to embrace also the President's commutation. For the statute to mean

this, after the words "one-third of the total of such term or terms for which he was sentenced" we must insert the words "or to which his sentence has been commuted" and after the words "if sentenced for the term of his natural life" we must insert the words "or if a death sentence be commuted to a life sentence". It could hardly be seriously contended that "sentence" in the sense used in the statute would be applicable to a commutation by the President from a death sentence to a sentence for life. In many cases where the sentence is the death penalty, the President reduces the sentence to life, but it never occurs to him that by so doing he is conditionally pardoning the man after fifteen years of imprisonment. Many sentenced to death are desperate characters, dangerous to be at large and the Executive naturally thinks that he is extending enough clemency when he gives them their lives.

PAROLE LAW NOT APPLICABLE TO COMMUTED SENTENCE.

The law itself segregates the court sentence from the Executive commutation and shows that it views them differently. Thus Section 10 of the Parole Act provides:

"That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case."

One might infer because a man had a right to be out on parole after serving one-third of his sentence that therefor, the right to pardon or reduce the sentence by the President was dispensed with. That if the Legislature said a man could be released by parole after serving one-third of his sentence it also meant to say that the President could not reduce the sentence so that he could be released absolutely after serving one-third of his term. Section 10 shows that the Parole Act and the pardoning power co-exist, that is, the court sentence is made a conditional pardon upon the President's conforming with certain conditions and at the same time the Executive pardoning power, whether by absolute pardon or by reducing the length of time of service, is left intact. But by co-existing it does not mean that the Act allowing sentences of courts to become conditional meant also to make the time substituted by the Executive for the court time, conditional. The Act did not mean to add to an act of grace, the reduction and commutation of time by the Executive, another act of grace, namely the reduction by parole.

of such reduction or commutation. The Legislature did not intend to do so because the necessity does not exist. The same thing as parole may be accomplished by the conditional pardon. Thus it is said in *Ex Parte Wells*, 59 U. S. 313; 15 L. Ed. 421:

“A pardon, therefore, being an act of such a nature as that by the common law it may be upon any condition, it has the same nature and operation in Pennsylvania, and it follows that the Governor may annex to a pardon any condition, whether subsequent or precedent, not forbidden by law. And it lies upon the grantee to perform the condition; or if the condition is not performed, the original sentence remains in full vigor and may be carried into effect.”

MEANING OF “SENTENCE ORIGINALLY IMPOSED”.

It is preferable to have a pardon of such a sort that its violation will result in the service of the sentence originally imposed and it is probable that this old rule suggested the language of Section 6 of the Parole Act, as follows:

“If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed; and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced.”

This court held in *Halligan vs. Mareil*, 208 Fed.

403, that a prisoner breaking his parole, who had prior to his release on parole, earned good time, upon his being remanded into custody was compelled to serve the sentence originally imposed by the court and not the sentence as reduced by his good time. And in a later decision, *Ex Parte Marcel*, 213 Fed. 990, the court, following the logic of the above decision holds that a prisoner can earn no good time after his return to prison for the breaking of his parole. If a man being out on parole after his sentence had been commuted, violated his parole, would not the logic of this decision compel the Warden to remand the prisoner for the period of the original sentence imposed by the court instead of that substituted by the President? Why should a man whose sentence was reduced by good time be controlled by any different rule than a man whose sentence had been shortened by the Executive? This clause more conclusively shows that the statute is directed at court sentences alone.

PARDONING POWER NOT TO BE IMPAIRED.

This statute says that the power to grant a pardon or commutation shall not be impaired. The

President, before the Act, had the power to reduce a sentence, say from eight years to four years. If you say that the Act is applicable to the reduced sentence, you are impairing his power. He says "I reduce a sentence from eight years to four years as I have a right to do. The man can serve four years and then be free". The court says to him, "You cannot do this. If you give him grace by lopping off four years this really means that he is entitled to parole grace at the end of one-third of four years. You have not the power to commute unless two-thirds of the reduced time is a conditional pardon". The President might well reply, "The prisoner had his choice, he could either take his eight years court sentence, which by law carried with it the right of parole after serving one-third of the time, or he could take the Executive pardon, which, though it carried with it no conditional right to be free at the end of one-third of his time, gives him the absolute right of freedom at the end of one-half of his time. The law allows me to grant a conditional pardon when I desire to do so, but does not compel me to do so when I am merely commuting a sentence".

The laws are to be construed liberally in favor of prisoners, but it is stretching far such liberality

to say that a law passed for the purpose of making court sentences less rigorous meant to do the same as to the pardoning power. The law was meant to temper justice, the sentence of the court, with mercy—not to temper mercy, Executive clemency, with additional mercy. But it may be said that this is not giving the Act a liberal construction to say that Congress meant to deprive a man altogether of his right of parole as soon as the President reduced his sentence—that it would be a hardship for a man sentenced to prison for say nine years and entitled to parole at the end of three years, to be deprived altogether of his parole because the President reduced his sentence to six years. We obviate the rigor of this construction by giving the language its literal meaning and say that when the prisoner has served one-third of the term for which he was originally sentenced, he should be entitled to parole even though he has already had one act of clemency extended to him. The logic of the law sustains the proposition that when the sentence is commuted by the President, the prisoner should serve the full time of the reduced sentence, but as a concession to the rule that a liberal construction should be given laws in favor of prisoners, we hold that the President did

not probably intend to deprive the prisoner of the right to parole which he already possessed because in such event we would be construing the President's act of leniency as depriving him of a clemency already granted to him. The difference is marked. We are construing the Executive intention so that the prisoner shall not be deprived of a right he already possessed on account of the exercise of such clemency, whereas the learned attorney for the defense is endeavoring to engraft on Executive clemency additional clemency meant to be applicable to judicial sentences alone. Our construction is more flexible, more reasonable on a further ground, to-wit: that it establishes a precedent less iron bound, less procrustean in nature. If the President desires, as in this case, to reduce the prisoner's sentence with no conditional right to be free at the end of one-third of the time, he can do so. If, on the other hand, he desires to reduce a man's sentence and pardon him conditionally after the service of one-third of the time, the law gives him this right. If the Executive so expresses his will, the courts must carry it out, but if the Executive does not do so, the courts have no right to read into his pardon words that were never there.

Then is it equitable that prisoners who are unable to secure commutation should have to serve a longer time to be entitled to parole than those who have secured it. The law should be just before it becomes generous.

THE GOOD TIME LAW.

The good time law provides:

"That each prisoner who has been or shall hereafter be convicted of any offense against the laws of the United States, and is confined, in execution of the judgment or sentence upon any such conviction, in any United States penitentiary or jail, or in any penitentiary, prison, or jail of any State or Territory, for a definite term, other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence to be estimated as follows, commencing on the first day of his arrival at the penitentiary, prison, or jail:

"Upon a sentence of not less than Six Months nor more than One Year, five days for each month.

"Upon a sentence of more than One Year and less than Three Years, six days for each month.

"Upon a sentence of not less than Three Years and less than Five Years, seven days for each month.

"Upon a sentence of not less than Five Years and less than Ten Years, eight days for each month.

"Upon a sentence of Ten Years or more, ten days for each month.

"When a prisoner has two or more sentences the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated."

The lower court after quoting this clause says:

"Upon the argument it was stated without question that, in applying the good time law, upon commutation of a sentence, the good time is calculated as from the beginning on the length of term of the sentence as commuted and not upon the sentence as originally imposed. This practice would, certainly, be more consonant with reason than that now contended for under the parole law."

We grant that the practice is as stated by the court, but because the practice is a certain way does not make it right. Many banks and commercial houses follow practices for a number of years which they think are right until they are rudely awakened by the courts and informed that they are wrong. Officials and business men are often obsessed with the idea that a certain practice makes a thing legally right, a modification of the doctrine of "whatever is, is right". There is no precedent to show that this practice is right and we do not believe that the good time law should be applied to a commuted sentence any more than the parole law unless the President says so. The same reason controls in both cases.

that the law did not intend to pile a Pelion on an Ossa of mercy.

But, if for the sake of argument, we assume that the good time law is applicable to commuted sentences there are good reasons for the practice followed.

In the first place the good time law says, "in execution of the judgment or sentence" not "in execution of the judgment of such conviction". It may be in execution of the judgment imposed by the court or a sentence fixed in some other way, as for example, by the Executive.

In the second place, if you allowed a man whose sentence had been reduced, good time computed on his original sentence, you would have his sentence cut down beyond all reason. A person sentenced for ten years whose time was reduced to one year would get out in eight months. According to the law of compensation a man sentenced for a long time should be given more good time than one whose time is shorter. The statute has fixed it so the good time is in proportion to the length of the sentence and if you compute the good time on the reduced sentence

according to computation on the original long sentence, you destroy this proportion.

So even if we concede the good time law to be applicable to commuted sentences (which we do not) the reason for the practice in this instance is the same as the reason governing our construction of the parole law, namely to prevent a pardon from granting a greater reduction of the penalty than was intended by the Executive.

Respectfully submitted,

CLAY ALLEN,

United States Attorney,

G. P. FISHBURNE,

Assistant United States Attorney.

United States
Circuit Court of Appeals
For the Ninth Circuit.

LARKIN-GREEN LOGGING COMPANY, a Corporation,
Appellant,
vs.

R. L. SABIN, as Trustee in Bankruptcy of the Estate
of CONSUMERS' LUMBER & SUPPLY
COMPANY, a Corporation,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the District of Oregon.

Filed

JAN 28 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

LARKIN-GREEN LOGGING COMPANY, a Corporation,

Appellant,

vs.

R. L. SABIN, as Trustee in Bankruptcy of the Estate of CONSUMERS' LUMBER & SUPPLY COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

KOLLOCK, ZOLLINGER and McDOWALL,
Corbett Building, Portland, Oregon, for the
Appellant.

BEACH, SIMON & NELSON, Board of Trade
Building, Portland, Oregon, and SIDNEY
TEISER, Morgan Building, Portland, Ore-
gon, for the Appellee.

*In the District Court of the United States for the
District of Oregon.*

No.———

R. L. SABIN, Trustee in Bankruptcy of the ES-
TATE OF CONSUMERS' LUMBER & SUP-
PLY COMPANY, a Corporation,

Plaintiff,

vs.

LARKIN-GREEN LOGGING COMPANY, a
Corporation,

Defendant.

United States of America,
District of Oregon,—ss.

[Citation on Appeal (Original).]

TO R. L. SABIN, Trustee in Bankruptcy of the
Estate of Consumers Lumber & Supply Com-
pany, a corporation, Greeting:

WHEREAS, Larkin-Green Logging Company, a
corporation, has lately appealed to the United States
Circuit Court of Appeals for the 9th Circuit from a
decree made, rendered and entered in the United

States District Court for the District of Oregon, made in favor of you, the complainant and plaintiff therein, the said R. L. Sabin, Trustee in Bankruptcy of the Estate of Consumers' Lumber & Supply Company, a corporation, and has filed the security required by law.

YOU ARE, THEREFORE, HEREBY CITED to appear at the said United States Circuit Court of Appeals for the 9th Circuit, at the City of San Francisco, California, within thirty days from the date hereof, to do and receive what may appertain to justice to be done in the premises.

Given under my hand and seal at Tacoma, Washington this —— day of December, A. D. 1914.

CHAS. E. WOLVERTON,
District Judge. [1*]

Due personal service of the within citation and receipt of copy acknowledged this 29th day of December, 1914.

SIDNEY TEISER,
Of Solicitors for Complainant. [2]

[Endorsed]: No. 6561, 19—98. In the District Court of the United States for the District of Oregon. R. L. Sabin, Trustee, Plaintiff, vs. Larkin-Green Logging Co., Defendant. Citation. U. S. District Court. Filed Dec. 28, 1914. By G. H. Marsh, Clerk. District of Oregon. [3]

*Page-number appearing at foot of page of original certified Record.

*In the District Court of the United States for the
District of Oregon.*

November Term 1914,

Be it remembered, that on the 13th day of November, 1914, there was duly filed in the District Court of the United States for the District of Oregon, an amended Bill of Complaint, in words and figures as follows, to wit: [4]

*In the District Court of the United States for the
District of Oregon.*

R. L. SABIN, Trustee in Bankruptcy of the Estate of Consumers Lumber & Supply Company, a Corporation,

Plaintiff,

vs.

LARKIN-GREEN LOGGING COMPANY,
a Corporation,

Defendant.

Amended Complaint in Equity.

To Honorable CHARLES E. WOLVERTON, and Honorable R. S. BEAN, Judges of the District Court of the United States for the District of Oregon:

R. L. Sabin, trustee of the estate of Consumers' Lumber & Supply Company, a corporation, brings this bill of complaint against Larkin-Green Logging Company, a corporation, and complains and says:

I.

That at all the times hereinafter mentioned Lar-

4 *Larkin-Green Logging Company*

kin-Green Lumber Company, a corporation, was, ever since has been, and now is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon.

II.

That heretofore, to wit, on the 17th day of April, 1913, a petition in involuntary bankruptcy was filed in this court against the Consumers' Lumber & Supply Company, a corporation, which said petition in involuntary bankruptcy is and was in the following words and figures, to wit:

*In the District Court of the United States for the
District of Oregon.*

In the Matter of CONSUMERS' LUMBER & SUPPLY CO., a Corporation.

Petition in Bankruptcy.

To the Honorable the Judges of the above-entitled Court:

The petition of E. C. Atkins & Company, a corporation of Chicago, Illinois, Honeyman Hardware Company, a corporation [5] of Portland, Oregon, The Gauld Company, a corporation of Portland, Oregon, and Robert A. Stewart and Charles A. Stewart, co-partners doing business as Stewart Brother's Company of Portland, Oregon, respectfully shows that Consumers' Lumber & Supply Company, during all the times hereinafter mentioned was, ever since has been and now is a corporation organized and existing under the laws of the State of Oregon.

That said Consumers' Lumber & Supply Company,

of Portland, Oregon has for the greater portion of six months next preceding the date or filing this petition, in fact, ever since its incorporation and organization, had its principal place of business and now has its principal place of business at Linnton in the County of Multnomah and State and District aforesaid, and owes debts to the amount of more than One Thousand Dollars and is a corporation principally engaged in manufacturing, trading and mercantile pursuits, to wit: in the manufacture of lumber and the selling and trading of lumber and like products.

That your petitioners are creditors of said Consumers Lumber & Supply Company having provable claims amounting in the aggregate, in excess of securities held by them, to the sum of Five Hundred Dollars (\$500.00).

That the nature and amount of your petitioners' claims are as follows, to wit:

That of E. C. Atkins & Company is for goods, wares and merchandise sold and delivered by said E. C. Atkins & Company to Consumers Lumber & Supply Company, consisting of chains, bits, holders, saws, bolting and like merchandise on account of which there remains due and unpaid a balance in the sum of Sixteen Hundred Ninety Dollars and Forty Cents (\$1690.40).

The claim of Stewart Brothers Company is for goods, wares and merchandise sold and delivered by said Stewart Brothers Company to said Consumers Lumber & Supply Company, on account of which, there remains unpaid the sum of Ten and 60/100 Dollars (\$10.60).

The claim of The Gauld Company is for goods, wares and merchandise consisting of plumbing material of the reasonable value of One Hundred Thirty-three and 08/100 Dollars (133.08), which amount remains and is unpaid and which material has been sold and delivered to said Consumers Lumber & Supply Company by the said Gauld Company.

The claim of Honeyman Hardware Company is for goods, wares and merchandise consisting of hardware in iron and steel material, which had been sold and delivered to the said Consumers Lumber & Supply Company by the said Honeyman Hardware Company, on which there is and remains unpaid a balance of Twelve Hundred Forty and 50/100 Dollars (\$1240.50).

And your petitioners further represent that said Consumers Lumber and Supply Company is insolvent and that within four months next preceding the date of this petition, the said Consumers Lumber & Supply Company committed an act of bankruptcy, in that it allowed Larkin-Green Logging Company to levy an attachment on all of the assets and property of said Consumers Lumber & Supply Company, which attachment has never been released or discharged or vacated, and which attachment was levied on December eighteenth, 1912, and will become a prior lien and cannot be removed or set aside or dissolved through bankruptcy proceeding, after April eighteenth, 1913.

That said Consumers Lumber & Supply Company has done nothing to vacate or set aside said attachment and has not [6] gone into bankruptcy volunt-

tarily and its failure to do so will thereby create a preference in favor of said Larkin-Green Logging Company, by reason of the attachment levied by said Larkin-Green Logging Company on said December eighteenth, 1912; said attachment is still a lien on all the assets of said debtors.

That unless said Consumers Lumber & Supply Company is adjudicated a bankrupt and unless this petition is filed forthwith, a preference will be gained and obtained by said Larkin-Green Logging Company as well as by Linnton Savings Bank, which levied a writ of attachment and attached all of the assets of said Consumers Lumber & Supply Company on December 26th, 1912, and therefore on April 26th, 1913, said Linnton Savings Bank will also obtain a preference, as said Consumers Lumber & Supply Company has done nothing to set aside said attachment, nor has it filed a voluntary petition in bankruptcy.

That the said obligations owing to said Larkin-Green Logging Company and Linnton Savings Bank are for prior indebtedness which was owing to the said attaching creditors prior to said December 18th, 1912.

That by reason of the foregoing facts said Consumers Lumber & Supply Company has permitted and suffered a preference in favor of said Larkin-Green Logging Company and Linnton Savings Bank which can only be set aside through an adjudication in bankruptcy, of said Consumers Lumber and Supply Company.

That at the time of the levy of said attachment and

for some time prior thereto and ever since that date, said Consumers Lumber & Supply Company has been insolvent and now is insolvent within the purview and meaning of the Bankruptcy Act, and its assets do not now equal and did not at the time of the levy of said attachments, and have not since equaled its liabilities at a fair market value of said assets.

WHEREFORE your petitioners pray that service of this petition with a subpoena, may be made upon said Consumers Lumber & Supply Company, as provided in the Acts of Congress relating to bankruptcy, and that it may be adjudged by the Court to be a bankrupt within the purview of said Act.

E. C. ATKINS & COMPANY,

By BEACH, SIMON & NELSON,

Its Attorneys.

HONEYMAN HARDWARE COMPANY,

By DAVID T. HONEYMAN,

Its Treasurer.

THE GAULD COMPANY,

By H. D. CURTIS,

Its Secretary.

STEWART BROTHERS COMPANY,

By C. A. STEWART,

President.

MARION DOLPH,

BEACH, SIMON & NELSON,

Attorneys for Petitioners.

United States of America,

District of Oregon,

County of Multnomah,—ss.

I, David T. Honeyman, being first duly sworn, de-

pose and say that I am Treasurer of the Honeyman Hardware Company, a corporation of Portland, Oregon, one of the petitioners above named and do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them are true.

DAVID T. HONEYMAN,

Before me a Notary Public this 17th day of April, 1913.

[Seal]

SIDNEY ZETOSCH,
Notary Public for Oregon. [7]

United States of America,
District of Oregon,
County of Multnomah,—ss.

I, H. D. Curtis, being first duly sworn, depose and say that I am Secretary of The Gauld Company, a corporation of Portland, Oregon, one of the petitioners above named and do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

H. D. CURTIS,

Before me a Notary Public this 17th day of April, 1913.

[Seal]

SIDNEY ZETOSCH,
Notary Public for Oregon.

United States of America,
District of Oregon,
County of Multnomah,—ss.

I, C. A. Stewart, being first duly sworn, depose and say that I am one of the members of the firm of Stewart Brothers Company of Portland, Oregon, one

of the petitioners above named, and do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

C. A. STEWART,

Before me a Notary Public this 17th day of April, 1913.

[Seal]

SIDNEY ZETOSCH,
Notary Public for Oregon.

United States of America,
District of Oregon,
County of Multnomah,—ss.

I, N. D. Simon, being first duly sworn, depose and say that I am one of the attorneys for E. C. Atkins & Company, one of the petitioning creditors within named. That I have personal knowledge of the facts stated in said petition and that the same are true as I verily believe.

That I make this verification, because no officer of said petitioning creditors is at present within the District or State of Oregon.

That I have been authorized by said E. C. Atkins & Company to file said petition and to make this verification.

N. D. SIMON.

Subscribed and sworn to before me this April 17th, 1913.

[Seal]

SIDNEY ZETOSCH,
Notary Public for Oregon.

III.

That thereafter, to wit: on the 23d day of April, 1913, said Larkin-Green Logging Company, a cor-

poration, appeared in this court through their attorneys, and filed a demurrer therein to said involuntary petition in bankruptcy, which said demurrer is and was in the following words and figures, to wit:

[8]

"In the District Court of the United States for the District of Oregon.

In the Matter of the Application of HONEYMAN HARDWARE COMPANY and Others to Have the CONSUMERS LUMBER & SUPPLY COMPANY, a Corporation, declared a Voluntary Bankrupt.

Demurrer.

Comes now LARKIN-GREEN LOGGING COMPANY, a corporation, organized and existing under and by virtue of the laws of the State of Oregon, and respectfully shows that it is a creditor of Consumers Lumber & Supply Company, and intervening as such creditor, specially and for the purpose of filing this demurrer, hereby demurs to the petition of Honeyman Hardware Company and others praying that the Consumers Lumber & Supply Company should be declared and adjudged a bankrupt under the laws of the United States, on the ground and for the reason that the facts alleged and recited in said petition as acts of bankruptcy do not constitute acts of bankruptcy under the statute or under the provisions of the law of the United States referring to bankruptcy; and that the said petition does not set forth sufficient facts to constitute acts of bankruptcy

under said statute or under the provisions of the law of the United States referring to bankruptcy, or sufficient to entitle the petitioners to an order adjudging the Consumers Lumber & Supply Company a bankrupt, or to confer jurisdiction upon this court to act upon said petition or to adjudge said Consumers Lumber & Supply Company, a bankrupt.

KOLLOCK & ZOLLINGER,
Attorneys for Larkin-Green Logging Company, an
intervening creditor.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

JOHN K. KOLLOCK,
Of Counsel for Larkin-Green Logging Company, an
intervening creditor.

State of Oregon,
District of Oregon,—ss.

FRED H. GREEN, being duly sworn, deposes and says: I am Secretary of the above-named intervening creditor, Larkin-Green Logging Company; the foregoing demurrer is not interposed for delay.

FRED H. GREEN.

Subscribed and sworn to before me this 22d day of April, 1913.

[Seal]

JOHN K. KOLLOCK,
Notary Public for Oregon."

IV.

That thereafter argument was had upon said demurrer by counsel for said demurrants, as well as by counsel for said petitioning creditors, and the Court, after consideration, entered on the 5th day

of May, 1913, an order overruling said demurrer, which said order was and is in the following words and figures, to wit: [9]

*"In the District Court of the United States for the
District of Oregon.*

No. 2355—IN BANKRUPTCY.

In the Matter of CONSUMERS LUMBER &
SUPPLY CO.,

Bankrupt.

This cause came on regularly for hearing at this time upon demurrer of Larkin-Green Logging Company to petition; Mr. John McCulloch appearing in behalf of demurrer.

Whereupon, said demurrer having been duly submitted after due consideration, It is Ordered that the said demurrer be, and the same hereby is, overruled.

WITNESS, the Honorable CHAS. E. WOLVERTON, Judge of said Court, and the seal thereof, at Portland, May 5, 1913.

(Signed) A. M. CANNON,
Clerk.

(Signed) By Fred H. Drake,
Deputy Clerk."

V.

That thereafter, to wit: on the 17th day of May, 1913, said Consumers Lumber & Supply Company, a corporation, by its attorney, Frederick H. Whitfield, appeared in this court and filed an answer to said involuntary petition in bankruptcy admitting

all the allegations thereof, and praying that it be adjudged bankrupt by this Court, in the following words and figures, to wit:

"In the District Court of the United States for the District of Oregon.

In the Matter of CONSUMERS LUMBER & SUPPLY COMPANY,

Alleged Bankrupt.

Answer.

Comes now the Consumers Lumber & Supply Company, a corporation, and as and for its answer to the petition of E. C. Atkins & Company, Honeyman Hardware Company, The Gauld Company and Stewart Brothers Company, filed herein April 17, 1913, asking for an adjudication of bankruptcy in this cause, says and alleges:

I.

It admits each and every statement, allegation and averment in said petition contained, and that said petition is substantially true in all particulars.

WHEREFORE, this alleged bankrupt prays that it be adjudicated by this Court to be a bankrupt within the purview of the Act of Congress in such case made and provided.

(Signed) FREDERICK H. WHITFIELD,
Solicitor for Alleged Bankrupt."

VI.

That on the 7th day of May, 1913, this Court having [10] jurisdiction of the parties to the said involuntary bankruptcy proceedings, and of the sub-

ject matter thereof, made and entered an order or decree of adjudication, which said order or decree of adjudication was and is in the following words and figures, to wit:

*"In the District Court of the United States for the
District of Oregon.*

No. 2355—IN BANKRUPTCY.

In the Matter of CONSUMERS' LUMBER &
SUPPLY CO., a Corporation,

Bankrupt.

At Portland, in said District, on the 7th day of May, A. D. 1913, before the Honorable CHARLES E. WOLVERTON, Judge of said Court in Bankruptcy, the petition of E. C. Atkins Co., of Chicago, Ill., Honeyman Hardware Co., The Gauld Company, and Stewart Brothers Co., of Portland, Ore., that Consumers Lumber and Supply Company be adjudged a bankrupt, within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said Consumers Lumber & Supply Company is hereby declared and adjudged bankrupt accordingly.

WITNESS the Honorable CHARLES E. WOLVERTON, Judge of said Court and the seal thereof affixed at Portland, in said District, this 7th day of May, 1913.

[Seal]

A. M. CANNON,
Clerk.
By F. L. Buck.
Deputy Clerk."

VII.

That no motion has been filed by the defendant herein, or at all, to vacate, set aside, or modify said adjudication, and that no appeal, writ of error, or writ of review has been taken from said order of adjudication, or from any proceeding in said bankruptcy cause, and that said order of adjudication has not been vacated, set aside, or modified, and is now and has been since it was entered, in full force and effect.

VIII.

That thereafter an order of reference was duly made referring said clause in bankruptcy to the Honorable Chester G. Murphy, referee in bankruptcy, and that said Chester G. Murphy duly acted as such referee in said cause, and that on the 10th day of June, 1913, the said Larkin-Green Logging Company, a corporation, duly presented and filed with said referee a proof of claim in bankruptcy, which said proof of claim was duly approved [11] and allowed by said referee in bankruptcy forthwith, which said proof of claim is in the following words and figures, to wit:

*"In the District Court of the United States for the
District of Oregon.*

IN BANKRUPTCY.

In the Matter of CONSUMERS LUMBER &
SUPPLY CO..

Bankrupt.

At Portland, in said District of Oregon, on the

11

10th day of May, A. D. 1913, came Fred H. Green,
of _____, in the county of _____, and State of
_____, and made oath, and says that he is Treasurer
of the Larkin-Green Logging Co., a corporation,
incorporated by and under the laws of the state of Oregon
and carrying on business at Portland, in the County of Multnomah, and State of Oregon, and that he is duly authorized to make this proof, and says that the said bankrupt, the person by (or against) whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition and still is, justly and truly indebted to said corporation in the sum of Seventy-four Hundred Twenty-four and 96/100 (\$7424.96) Dollars: with interest thereon at six per cent per annum from Oct. 13, 1913; that the consideration of said debt is as follows: sale of logs of the agreed price of \$7424.96. said sum being further evidenced by two certain promissory in the sums of \$3393.41 and \$3831.55, respectively, and dated October 13, 1913, which notes are hereto annexed:

(Copies of notes as follows, to wit:)

..\$3831.55 Portland, Ore., Oct. 13, 1912

Sixty days after date, without grace, we promise to pay to the order of Larkin-Green Logging Co., at their office. Thirty-eight Hundred Thirty-one and 55 100 Dollars in Gold Coin of the United States of America, with interest thereon in like Gold Coin, at the rate of six per cent per annum from date until paid, for value received. Interest payable at maturity and in case suit or action is instituted to

collect this Note or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

No. _____.

Due _____.

CONSUMERS LUMBER & SUPPLY CO.

By H. T. BURNTRAGER,

Secy. & Treas.

HENRY FOLZ,

President."

"3393.41 Portland, Ore., Oct. 13, 1912.

Sixty days after date, without grace, we promise to pay to the order of Larkin-Green Logging Co. at their office, Thirty-three Hundred Ninety-three and 41/100 Dollars in Gold Coin of the United States of America, with interest thereon in like Gold Coin, at the rate of six per cent per annum from date until paid, for value received. Interest payable at maturity, and in case suit or action is instituted to collect this Note or any portion thereof, we promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

No. _____.

Due _____.

CONSUMERS' LUMBER & SUPPLY CO.

By H. T. BURNTRAGER,

Secy. & Treas.

HENRY FOLZ,

President."

That no part of said debt has been paid.

That there are no set-offs or counterclaims to the same.

That no judgment has ever been recovered thereon; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever.

FRED H. GREEN,
Treasurer of said Corporation.

Subscribed and sworn to before me this 10th day of May, A. D. 1913.

[Seal]

E. WINN,
Notary Public for Oregon. [12]

LETTER OF ATTORNEY.

To Kollock & Zollinger,

Corbett Bldg., Portland, Oregon.

The undersigned Larkin-Green Logging Co., a corporation organized and existing under the laws of the State of Oregon, and having an office and place of business at the City of Portland, Multnomah County, State of Oregon, does hereby authorize you or any one of you to attend the meeting or meetings of creditors of the bankrupt aforesaid, at a Court of Bankruptcy wherever advertised or directed to be holden, on the day and at the hour appointed and notified by the Court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there, from time to time, and as often as there may be occasion, for it, and in its name to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress relating to Bankruptcy, and in the choice of Trustee or Trustees of

the estate of said bankrupt, and for it to assent to the appointment of such Trustee or Trustees; with like power to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of its debts, and to receive payment of dividends and of money due it under any composition, and for any other purpose whatsoever in its interest, with full power of substitution and revocation.

IN WITNESS WHEREOF, the said corporation has caused these presents to be executed by its Treasurer, Fred H. Green, duly authorized thereto, the 10th day of May, A. D. 1913.

LARKIN-GREEN LOGGING CO.

By FRED H. GREEN,

Treasurer of Said Corporation.

Signed, sealed and delivered in the presence of:

E. WINN.

State of Oregon,

County of Multnomah,—ss.

BE IT REMEMBERED, that on the 10th day of May, A. D. 1913, before me, the undersigned a notary public in and for said county and State, personally appeared Fred H. Green, to me personally known, and made oath and says: That he is Treasurer of Larkin-Green Logging Co., the corporation named in the foregoing Letter of Attorney; that said Letter of Attorney was signed and sealed on behalf of said corporation by due authority, and that it is the free and voluntary act and deed of said corporation, and

that the seal affixed to said Letter of Attorney is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this, my certificate above written.

[Seal]

E. WINN,

Notary Public in and for the State of Oregon.

IX.

That said notes annexed to said proof of claim and the consideration of the debt set forth therein, are the same notes and debt upon which suit was instituted in the Circuit Court of the State of Oregon for the County of Multnomah, on the 19th day [13] of December, 1912, in which suit a writ of attachment was issued and the property of the Consumers' Lumber & Supply Company, a corporation, levied upon, and in which judgment was obtained and execution threatened, as set forth in paragraphs XII and XIII hereof.

X.

That thereafter, the matter having been duly referred to the referee in bankruptcy by this court, as aforesaid, a meeting of creditors for the election of the trustee and the examination of the bankrupt, pursuant to the provisions of the Bankruptcy Act, was duly called and held, in which said meeting, on the 16th day of June, 1913, the defendant herein participated as an unsecured creditor in the election of a trustee; that one C. C. Rose was duly elected trustee of the estate of Consumers' Lumber & Supply Company, a corporation, bankrupt, and duly qualified and acted as such trustee from said date to the

5th day of October, 1914, at which date the said C. C. Rose, having tendered his resignation as trustee of said estate, said resignation was accepted, and R. L. Sabin, plaintiff herein, was duly elected and appointed trustee of said estate.

XI.

That the plaintiff, R. L. Sabin, duly qualified as trustee of said estate in bankruptcy by filing the required bond, which bond was duly approved and ordered filed, and has ever since acted, and is now acting as trustee of said estate in bankruptcy.

XII.

That said R. L. Sabin, trustee, is duly authorized, empowered, and directed to sell the property of said bankrupt coming into his hands, and that amongst the property coming into his hands which he is duly authorized to sell, are certain logs, lumber and timber, together with certain machinery, mill and equipment, located and situated near Ban Station, county of Multnomah, Portland, Oregon, which property was attached in a suit instituted in the Circuit Court of the State of Oregon for the [14] County of Multnomah, on the 19th day of December, 1912, by the Larkin-Green Logging Company, a corporation, and within four months of the filing of the petition in bankruptcy against said Consumers' Lumber & Supply Company, to recover judgment in the amount of \$7,224.96, with interest at the rate of 6% per annum from October 13, 1912, and \$500.00 reasonable attorney's fees, and costs and disbursements in said suit, and in which suit judgment was obtained as

prayed subsequent to the filing of the petition in bankruptcy.

XIII.

That your trustee, authorized as aforesaid to make sale of said property, is prevented, embarrassed and deterred from making a suitable sale of said property by reason of the fact that the said Larkin-Green Logging Company is asserting claim to said property by reason of said attachment and judgment mentioned in paragraph XII, and that execution is now threatened to be issued upon said judgment, and demand has been made upon the sheriff of Multnomah County to sell said property mentioned in paragraph XII under said execution and attachment.

XIV.

That by reason of said threats, claims, demands, and actions of the said defendant, Larkin-Green Logging Company, a corporation, which said threats, claims, demands and actions are without right, and which are based upon no title to said property or valid claims thereto, a cloud is cast upon the title of said trustee to said property and thereby the value of said property is being depreciated, and the plaintiff, as trustee, by reason of said threats, claims, demands, and actions of the defendant, Larkin-Green Logging Company, a corporation, has found, and will find it impracticable and impossible to sell said property at a reasonable value, or obtain a fair price therefor, and plaintiff as trustee is therefore embarrassed, deterred, and interfered with in his duty as an officer of this court. [15]

XV.

That on the 19th day of October, 1914, plaintiff herein, as trustee in bankruptcy, was duly authorized and ordered to enter this suit, by order entered by the referee in bankruptcy herein.

WHEREFORE, plaintiff prays that this Honorable Court may determine the right of the trustee in said property, and remove the cloud from said title, and that said Larkin-Green Logging Company, a corporation, its agents, employees, and attorneys, be enjoined and restrained from further prosecuting the said action instituted by it against the Consumers' Lumber & Supply Company, a corporation, and from attempting to levy upon said property or make sale thereof under said attachment or judgment in said suit.

That T. M. Word, sheriff of Multnomah County, Oregon, and any other officer of the county of Multnomah, State of Oregon, be enjoined and restrained from levying upon or selling said property, and in any way interfering with the same, and that the said Larkin-Green Logging Company, a corporation, its agents, employees, and attorneys be further enjoined and restrained from instituting any further suits or actions whatsoever from the recovery of said property.

That said trustee be awarded his reasonable costs and disbursements in this behalf expended, together with a reasonable attorney's fee on behalf of his attorney, and for such other and further relief as may

to equity be meet, and to this Court expedient.

R. L. SABIN,
Plaintiff.

BEACH, SIMON & NELSON,
SIDNEY TEISER,
Attorneys for Plaintiff.

United States of America,
Dist. and State of Oregon,
County of Multnomah,—ss.

I, R. L. Sabin, being first duly sworn, depose and say that I am plaintiff in the above proceeding, whose name is signed to the foregoing Amended Complaint in Equity, and that all the facts contained therein are true, as I verily believe.

R. L. SABIN.

Subscribed and sworn to before me this 12th day of November, 1914.

[Seal] H. A. KETTERMAN,
Notary Public for Oregon. [16]

United States of America,
State of Oregon,
County of Multnomah,—ss.

Due service of the within Amended Complaint in Equity is hereby accepted in Multnomah County, Oregon, this 12th day of November, 1914, by receiving a copy thereof, duly certified to as such by Sidney Teiser, Attorney for Plaintiff.

KOLLOCK, ZOLLINGER and McDOWELL,
Attorneys for Defendant.

Filed November 13, 1914. G. H. Marsh, Clerk.
[17]

And afterwards, to wit, on the 19th day of November, 1914, there was duly filed in said court, a Motion to Dismiss, in words and figures as follows, to wit: [18]

In the District Court of the United States for the District of Oregon.

No.—

R. L. SABIN, Trustee in Bankruptcy of the Estate of CONSUMERS LUMBER & SUPPLY COMPANY, a Corporation,

Plaintiff,

vs.

LARKIN-GREEN LOGGING COMPANY, a Corporation,

Defendant.

Motion [to Dismiss].

To The HONORABLE CHARLES E. WOLVERTON and HONORABLE R. S. BEAN, Judges of the District Court of the United States for the District of Oregon:

Comes now the defendant herein and moves the Court that the bill in equity herein be dismissed on the following grounds, to wit:

I.

That the Court has no jurisdiction of the person of this defendant or of the subject of this action, on the ground and for the reason that the petition in involuntary bankruptcy filed in the above-entitled court against Consumers Lumber & Supply Company is pleaded in full in the amended complaint herein;

and that said petition shows on its face a lack of jurisdiction in the above-entitled court, sitting as a court of bankruptcy, to entertain said petition or to adjudicate a bankrupt the Consumers Lumber & Supply Company, in that the alleged act of bankruptcy set forth in said petition is not an act of bankruptcy under the United States Statute relative to bankruptcy;

II.

That the plaintiff has no legal capacity to sue on the ground and for the reason that the petition in bankruptcy filed in the above-entitled court against Consumers Lumber & Supply Company is pleaded in full in the amended complaint herein, and that said [19] petition shows on its face that the above-entitled court, sitting as a court of bankruptcy, had no jurisdiction to entertain said petition to adjudicate a bankrupt the Consumers Lumber & Supply Company, and that all subsequent proceedings of said bankruptcy court, including election of trustee in bankruptcy, were null and void and of no effect, in that the alleged act of bankruptcy set forth in said petition is not an act of bankruptcy under the United States Statute;

III.

That the amended complaint fails to state facts sufficient to constitute a cause of suit against this defendant.

KOLLOCK, ZOLLINGER & McDOWELL,
Attorneys for Defendant.

I hereby certify that the foregoing motion is in my opinion well founded in point of law.

JOHN K. KOLLOCK.

United States of America,
District and State of Oregon,
County of Multnomah,—ss.

FRED H. GREEN, being first duly sworn, deposes and says:

I am secretary of the above-named defendant, Larkin-Green Logging Company; that the foregoing motion is not interposed for delay.

FRED H. GREEN.

Subscribed and sworn to before me this 16th day of November, 1914.

[Seal]

JOHN K. KOLLOCK,
Notary Public for Oregon.

State of Oregon,
County of Multnomah,—ss.

Due service of the within motion is hereby accepted in Multnomah County, Oregon, this 17th day of November, 1914, by receiving a copy thereof, duly certified to as such, by John K. Kollock, one of the attorneys for Dft.

SIDNEY TEISER,
of Attorneys for Pltf.

Filed November 19, 1914. G. H. Marsh, Clerk.
[20]

And afterwards, to wit, on Monday, the 21st day of December, 1914, the same being the 43d Judicial day of the regular November, 1914, term of said Court; Present: the Honorable CHARLES E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to wit: [21]

*In the District Court of the United States for the
District of Oregon.*

No. 6561.

December 21, 1914.

R. L. SABIN,

Trustee,

vs.

LARKIN-GREEN LOGGING CO.

[Order Denying Motion to Dismiss.]

This cause was heard upon the motion of the plaintiff to dismiss the bill of complaint herein and was argued by Mr. Sidney Teiser, of counsel for the plaintiff and by Mr. John K. Kollock, of counsel for the defendant; on consideration whereof, it is ordered and adjudged that said motion be and the same is hereby denied. [22]

And afterwards, to wit, on the 21st day of December, 1914, there was duly filed in said court, an Opinion, in words and figures as follows, to wit:

[23]

No. 6561.

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of CONSUMERS LUMBER & SUPPLY COMPANY, a Corporation,

Plaintiff,

vs.

LARKIN-GREEN LOGGING COMPANY, a Corporation,

Defendant.

BEACH, SIMON & NELSON and SIDNEY TEISER, for Plaintiff.

KOLLOCK, ZOLLINGER & McDOWALL, for Defendant.

Opinion.

WOLVERTON, District Judge:

This is a suit by the trustee in bankruptcy of the estate of the Consumers Lumber & Supply Company to determine his title to certain logs, free and unencumbered by a lien by way of an attachment against the Supply Company, which the defendant claims it has by right of a valid and still existing levy. A petition was filed in bankruptcy by certain creditors of the Supply Company April 17, 1913, which sets forth that said company "committed an act of bankruptcy,

in that it allowed Larkin-Green Logging Company to levy an attachment on all of the assets and property of said Consumers Lumber & [24] Supply Company, which attachment has never been released or discharged or vacated, and which attachment was levied on December eighteenth, 1912, and will become a prior lien and cannot be removed or set aside or dissolved through bankruptcy proceeding, after April eighteenth, 1913.

“That said Consumers Lumber & Supply Company has done nothing to vacate or set aside said attachment and has not gone into bankruptcy voluntarily and its failure so to do will thereby create a preference in favor of said Larkin-Green Logging Company, by reason of the attachment levied by said Larkin-Green Logging Company on said December eighteenth, 1912; said attachment is still a lien on all the assets of said debtors.

“That unless said Consumers Lumber & Supply Company is adjudicated a bankrupt and unless this petition is filed forthwith, a preference will be gained and obtained by said Larkin-Green Logging Company as well as by Linnton Savings Bank, which levied a writ of attachment and attached all of the assets of said Consumers Lumber & Supply Company on December 26th, 1912, and therefore on April 26th, 1913, said Linnton Savings Bank will also obtain a preference, as said Consumers Lumber & Supply Company has done nothing to set aside said attachment, nor has it filed a voluntary petition in bankruptcy.

“That the said obligations owing to said Larkin-

Green Logging Company and Linnton Savings Bank are for prior indebtedness which was owing to the said attaching creditors prior to said December 18th, 1912.

"That by reason of the foregoing facts said [25] Consumers Lumber & Supply Company has permitted and suffered a preference in favor of said Larkin-Green Logging Company and Linnton Savings Bank which can only be set aside through an adjudication in bankruptcy, of said Consumers Lumber & Supply Company."

All this is set out in the complaint, which further shows that the Supply Company was insolvent at the time of the attachment and at all times up to the time of the filing of the petition.

A demurrer to the petition was interposed by the Logging Company, assigning as a ground therefore that the facts stated do not constitute an act of bankruptcy, and, after a hearing, was overruled by the Court. Subsequently the Supply Company filed an answer admitting the allegations of the petition, and prayed that it be adjudged a bankrupt, and on May 7, 1913, the adjudication followed.

The Logging Company challenges the sufficiency of the complaint by motion to dismiss, on the ground that the court in bankruptcy was without jurisdiction to pass the adjudication, and that it does not state facts to entitle plaintiff to the relief demanded.

Practically the only question presented is whether the court in bankruptcy had jurisdiction to adjudicate the Supply Company a bankrupt upon the petition before it. The Logging Company insists that

the Court was without jurisdiction because the petition failed to state an act of bankruptcy. The attack is one collateral in character, and the consideration must proceed upon that basis. [26]

The court of bankruptcy is one of limited jurisdiction, in the sense that it can take cognizance of particular subjects only, namely, those included within the intendment of the statute, but its jurisdiction is unlimited in respect of its powers over proceedings in bankruptcy specifically made subject to its jurisdiction by section 2 of the Bankruptcy Act. And it is said:

“When judgments are rendered by that court upon questions arising in such proceedings, they possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction. Its judgments, unless reversed on appeal or writ of error, import absolute verity.”

Edelstein v. United States, 149 Fed. 636, 638.

See also, *In re First Nat. Bank of Belle Fourche et al.*, 152 Fed. 64; *In re Columbia Real Estate Co.*, 101 Fed. 965, 970; and *In re Marion Contract & Construction Co.*, 166 Fed. 618.

In the First National Bank case, which was in bankruptcy, it is said:

“The jurisdiction of a court is not limited to the power to render correct decisions. It is the power to decide the issues according to its view of the law and the evidence, and its wrong decisions are as conclusive as its right ones. It empowers the Court to determine every issue within the scope of its authority, whether its decision is right or wrong,

and every judgment or decision so rendered is final and conclusive upon the parties, unless reversed by writ of error or appeal or [27] vacated by some direct proceeding."

Advancing to the sufficiency of the petition, it must be conceded that the Court committed an error in overruling the demurrer thereto (*Citizens Banking Co. v. Ravenna National Bank*, recently decided by the Supreme Court); but my conviction is that, the court having the power to adjudicate, its adjudication as to the sufficiency of the petition became final and binding upon the parties concerned, until set aside by review or appeal, and that it cannot now be questioned in a collateral way.

There was an attempt to set up the third act of bankruptcy. The petition failed in that, but it does not follow that the petition might not have been amended so as to state a good cause, and, the court having jurisdiction to decide, its adjudication must be held final until vacated by direct attack, especially as the bankrupt has itself admitted insolvency and prayed for the adjudication.

There exists another reason, however, why the defendant should not be permitted to resist the suit, which is that it has subsequently proved its claim as unsecured, and participated in the subsequent proceeding. Having done this, and it is so alleged, it cannot object to the jurisdiction of the court to make the adjudication.

In re Hintze, 134 Fed. 141;

In re Worsham, 142 Fed. 121;

In re New York Tunnel Co., 166 Fed. 284.

Motion denied.

Filed December 21, 1914. G. H. Marsh, Clerk.

[28]

And afterward, to wit, on the 28^h day of December, 1914, there was duly filed in said court, a Stipulation That Final Decree be Entered, in words and figures as follows, to wit: [29]

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of CONSUMERS LUMBER & SUPPLY COMPANY, a Corporation,

Plaintiff,

vs.

LARKIN-GREEN LOGGING COMPANY, a Corporation,

Defendant.

Stipulation [That Final Decree be Entered, etc.].

It is stipulated by and between the plaintiff, R. L. Sabin, Trustee, and the defendant, Larkin-Green Logging Company, a Corporation through their respective attorneys, that the defendant, Larkin-Green Logging Company, a Corporation, hereby waives the ten-day period prescribed by Rule 34 of the United States District Court rules for the District of Oregon, in which to answer after a demurrer or motion has been disposed of, and offers no objection to a decree being taken by plaintiff, said defendant desiring and determining to stand upon the decision upon its motion to dismiss or demurrer, and this stipula-

tion is made for the purpose of speedily perfecting an appeal.

Dated this 28th day of December, 1914.

SIDNEY TEISER,

Attorney for Plaintiff.

KOLLOCK, ZOLLINGER & McDOWALL,

Attorneys for Defendant.

Filed December 28, 1914. G. H. Marsh, Clerk.

[30]

And afterwards, to wit, on Monday, the 28th day of December, 1914, the same being the 49th judicial day of the regular November, 1914, term of said court; Present: the Honorable CHARLES E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to wit: [31]

In the District Court of the United States for the District of Oregon.

R. L. SABIN, Trustee in Bankruptcy of the Estate of CONSUMERS' LUMBER & SUPPLY COMPANY, a Corporation,

Plaintiff,

vs.

LARKIN-GREEN LOGGING COMPANY, a Corporation,

Defendant.

Decree.

This cause having come on this day to be heard upon the plaintiff's amended complaint in equity, and

the defendant's motion to dismiss filed herein, and it appearing that the Court has heretofore denied defendant's said motion to dismiss, and it further appearing by stipulation filed herein that defendant does not intend or desire to answer said amended complaint in equity, and has specifically waived the time allowed to it by the rules of court within which to answer upon the determination of a motion to dismiss, and it further appearing from the facts set forth in plaintiff's said amended complaint in equity that plaintiff is entitled to the relief prayed for therein, therefore,

IT IS ADJUDGED, ORDERED, AND DECREED that R. L. Sabin, Trustee of the Estate of Consumers' Lumber & Supply Company, a corporation, bankrupt, has good title and right to the property of the said Consumers' Lumber & Supply Company, a corporation, bankrupt, and more particularly to certain logs, lumber, and timber, together with certain machinery, mill, and equipment, located and situated near Ban Station, County of Multnomah, Portland, Oregon, coming into his hands, which property was attached in a suit instituted [32] in the Circuit Court of the State of Oregon for the County of Multnomah, on the 19th day of December, 1912, by the Larkin-Green Logging Company, a corporation.

AND IT IS FURTHER ADJUDGED, ORDERED, AND DECREED, that the Larkin-Green Logging Company, a corporation, its agents, employees, and servants, be, and they hereby are enjoined and restrained from further prosecuting

said action instituted in said Circuit Court of the State of Oregon for the County of Multnomah, and from attempting to levy upon said property heretofore mentioned, or to make a sale thereof under said attachment or judgment in said suit, and that the sheriff of said County of Multnomah and his successors in office, and any other officer of the County of Multnomah, State of Oregon, be, and they hereby are enjoined and restrained from levying upon or selling said property, or in any way interfering with the same.

AND IT IS FURTHER ADJUDGED, ORDERED, AND DECREED, that said Larkin-Green Logging Company, a corporation, defendant, be, and it hereby is enjoined and restrained from instituting any further suits or actions whatsoever for the recovery of said property.

AND IT IS FURTHER ADJUDGED, ORDERED AND DECREED that the plaintiff herein have his reasonable costs and disbursements in this behalf expended, taxed at \$_____.

Dated this 28th day of December, 1914.

CHAS. E. WOLVERTON,

Judge.

Filed December 28, 1914. G. H. MARSH, Clerk.

[33]

And afterwards, to wit, on the 28th day of December, 1914, there was duly filed in said Court, a Petition for Appeal, in words and figures, as follows, to wit: [34]

In the District Court of the United States for the District of Oregon.

No. —.

R. L. SABIN, Trustee in Bankruptcy of the Estate of CONSUMERS' LUMBER & SUPPLY COMPANY, a Corporation,

Plaintiff,

vs.

LARKIN-GREEN LOGGING COMPANY, a Corporation,

Defendant.

Petition [for Appeal].

The above-named defendant, Larkin-Green Logging Company, a corporation, feeling itself aggrieved by the decree entered in the above-entitled court and cause, on the 28th day of December, 1914, does hereby appeal from said decree to the United States Circuit Court of Appeals for the 9th District, for the reasons set forth and specified in the assignment of errors which is filed herewith, and prays that an appeal be allowed and that citation issue as provided by law, and that a transcript of the record and proceedings upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 9th Circuit; and,

Your petitioner further prays that a proper order, touching the security to be required of it to perfect its appeal be made.

KOLLOCK, ZOLLINGER & McDOWALL,
Solicitors for Defendant, Larkin-Green Logging
Company, a Corporation.

Due personal service of the within petition for appeal made and admitted, and receipt of copy acknowledged, this 28th day of December, 1914.

SIDNEY TEISER,
Solicitor for Complainants.

Filed December 28, 1914. G. H. Marsh, Clerk.

[35]

And afterwards, to wit, on the 28th day of December, 1914, there was duly filed in said court, an Assignment of Errors, in words and figures as follows, to wit: [36]

In the District Court of the United States for the District of Oregon.

No. ——.

R. L. SABIN, Trustee in Bankruptcy of the Estate of CONSUMERS' LUMBER & SUPPLY COMPANY, a Corporation,

Plaintiff,

vs.

LARKIN-GREEN LOGGING COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now the defendant, Larkin-Green Logging Company, a corporation, and says that, in the decree herein made and entered there is manifest error, and makes and files the following assignment of errors committed and happening in the said cause, upon which it will rely in its appeal from said decree.

I.

The United States District Court for the District of Oregon erred in rendering and entering a decree herein in favor of the complainant and against the defendant, Larkin-Green Logging Company;

II.

That the Court erred in overruling and denying defendant's motion to dismiss the complaint of the complainants;

III.

That the Court erred in refusing to sustain and grant defendant's motion to dismiss complainant's complaint herein;

IV.

That the Court erred in holding that it had or has jurisdiction of the person of this defendant or of the subject matter of the above-entitled cause; [37]

V.

That the Court erred in not holding that the court had no jurisdiction of the person of this defendant or the subject matter of the above-entitled court;

VI.

That the Court erred in holding that the plaintiff had legal capacity to sue in the above-entitled cause;

VII.

That the Court erred in not holding that plaintiff had and has no legal capacity to sue in the above-entitled cause;

VIII.

That the Court erred in holding that the amended complaint in the above-entitled cause stated facts sufficient to constitute a cause of suit against this defendant;

IX.

That the Court erred in not holding that the amended complaint herein failed to state facts sufficient to constitute a cause of suit against this defendant.

KOLLOCK, ZOLLINGER & McDOWALL,
Attorneys and Solicitors for Defendant, Larkin-
Green Logging Company.

Filed December 28, 1914. G. H. Marsh, Clerk.

[38]

And afterwards, to wit, on Monday, the 28th day of December, 1914, the same being the 49th judicial day of the regular November, 1914 term of said court; Present: the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [39]

*In the District Court of the United States for the
District of Oregon.*

No. 6561.

R. L. SABIN, Trustee in Bankruptcy of the Estate
of CONSUMERS' LUMBER & SUPPLY
COMPANY, a Corporation,

Plaintiff,

vs.

LARKIN-GREEN LOGGING COMPANY, a Cor-
poration,

Defendant.

[Order Fixing Amount of Bond.]

The petition of defendant, Larkin-Green Logging Company, a corporation, for an appeal and allowance thereof, that citation issue as provided by law, and that a transcript of the records and proceedings upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 9th Circuit, having been duly presented to the Court,

IT IS NOW, THEREFORE, ORDERED, AD-JUDGED AND DECREED that said petition be and the same is hereby granted and is hereby allowed this 28th day of December, 1914, to appeal the above-entitled cause to the United States Circuit Court of Appeals for the 9th Circuit, and the bond on appeal is hereby fixed at the sum of \$500.00.

Dated this 28th day of December, 1914.

CHAS. E. WOLVERTON,

Judge.

Filed December 28, 1914. G. H. Marsh, Clerk.
[40]

And afterwards, to wit, on the 28th day of December, 1914, there was duly filed in said court, a Bond on Appeal, in words and figures as follows, to wit: [41]

In the District Court of the United States for the District of Oregon.

No. —.

R. L. SABIN, Trustee in Bankruptcy of the Estate of CONSUMERS' LUMBER & SUPPLY COMPANY, a Corporation,

Plaintiff,

vs.

LARKIN-GREEN LOGGING COMPANY, a Corporation,

Defendant.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That Larkin-Green Logging Company, a corporation, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto the above-named R. L. Sabin, Trustee in Bankruptcy of the Estate of Consumers' Lumber & Supply Company, a corporation, in the sum of \$500.00, for the payment of which well and truly to be made, we jointly and severally bind ourselves and each of our successors and assigns firmly by these presents, sealed with our respective corporate seals and dated

this 28th day of December, 1914.

WHEREAS, the above-named defendant has prosecuted an appeal to the United States Circuit Court of Appeals for the 9th Circuit, to reverse a decree rendered and entered in the above-entitled cause in the United States District Court for the District of Oregon, on December 28, 1914;

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH that the above-named defendant, Larkin-Green Logging Company, a corporation, shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fails to make good its plea; then the above obligation to be void; [42] otherwise, to remain in full force and virtue.

[Seal of the American Surety Company.]

LARKIN-GREEN LOGGING COMPANY,

By JOHN K. KOLLOCK,

Att'y.

AMERICAN SURETY COMPANY OF NEW YORK,

By JOHN K. KOLLOCK,
Resident Vice-President.

AMERICAN SURETY COMPANY OF NEW YORK,

By W. A. KING,
Resident Assistant Secretary.

W. A. KING,
Resident Agent.

The above and foregoing cost bond is hereby approved this 28th day of December, 1914.

CHAS. E. WOLVERTON,
United States District Judge.

Filed December 28, 1914. G. H. Marsh, Clerk.

[43]

And afterwards, to wit, on the 28th day of December, 1914, there was duly filed in said court, a Praeclipe for Transcript, in words and figures as follows, to wit: [44]

In the District Court of the United States for the District of Oregon.

No. —.

R. L. SABIN, Trustee in Bankruptcy of the Estate of CONSUMERS' LUMBER & SUPPLY COMPANY, a Corporation,
Plaintiff,

vs.

LARKIN-GREEN LOGGING COMPANY, a Corporation,

Defendant.

[Praeclipe for Transcript of Record.]

To the Clerk of the Above-entitled Court:

You will please prepare transcript on appeal in the above-entitled cause, containing amended complaint, motion to dismiss the complaint, bond opinion of the Court, decree and appeal papers.

In preparing said transcript on appeal kindly

avoid the inclusion of more than one copy of the same paper.

KOLLOCK, ZOLLINGER & McDOWALL,
Attorneys for Defendant.

Filed December 28, 1914. G. H. Marsh, Clerk.

[45]

[Certificate of Clerk U. S. District Court to
Transcript of Record.]

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 4 to 43 constitute the transcript of record on appeal from the final decree of said Court in the cause pending in said Court between R. L. Sabin, Trustee in Bankruptcy of the Estate of Consumers' Lumber & Supply Company, a corporation, Plaintiff and Appellee, and the Larkin-Green Logging Company, a corporation, Defendant and Appellant; that said transcript has been prepared in accordance with the praecipe for transcript filed in said cause by said Appellant, and is a true and complete transcript of the record and proceedings had in said Court, in said cause, in accordance with said praecipe.

I further certify that the cost of said transcript is \$22.60, and that the same has been paid by said Appellant.

In testimony whereof, I have hereunto set my

hand and affixed the seal of said Court at Portland, in said District, this 29th day of December, 1914.

[Seal]

G. H. MARSH,

Clerk.

[Ten Cents Internal Revenue Stamp. Canceled.
December 24, 1914. G. H. M.] [46]

[Endorsed]: No. 2534. United States Circuit Court of Appeals for the Ninth Circuit. Larkin-Green Logging Company, a Corporation, Appellant, vs. R. L. Sabin, as Trustee in Bankruptcy of the Estate of Consumers' Lumber & Supply Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed December 31, 1914.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the Circuit Court of Appeals of the
United States
FOR THE NINTH CIRCUIT

LARKIN-GREEN LOGGING COMPANY,
a corporation, *Appellant-Defendant,*

vs.

R. L. SABIN, Trustee in Bankruptcy of the Estate
of CONSUMERS LUMBER & SUPPLY
COMPANY, a corporation,

Respondent-Plaintiff.

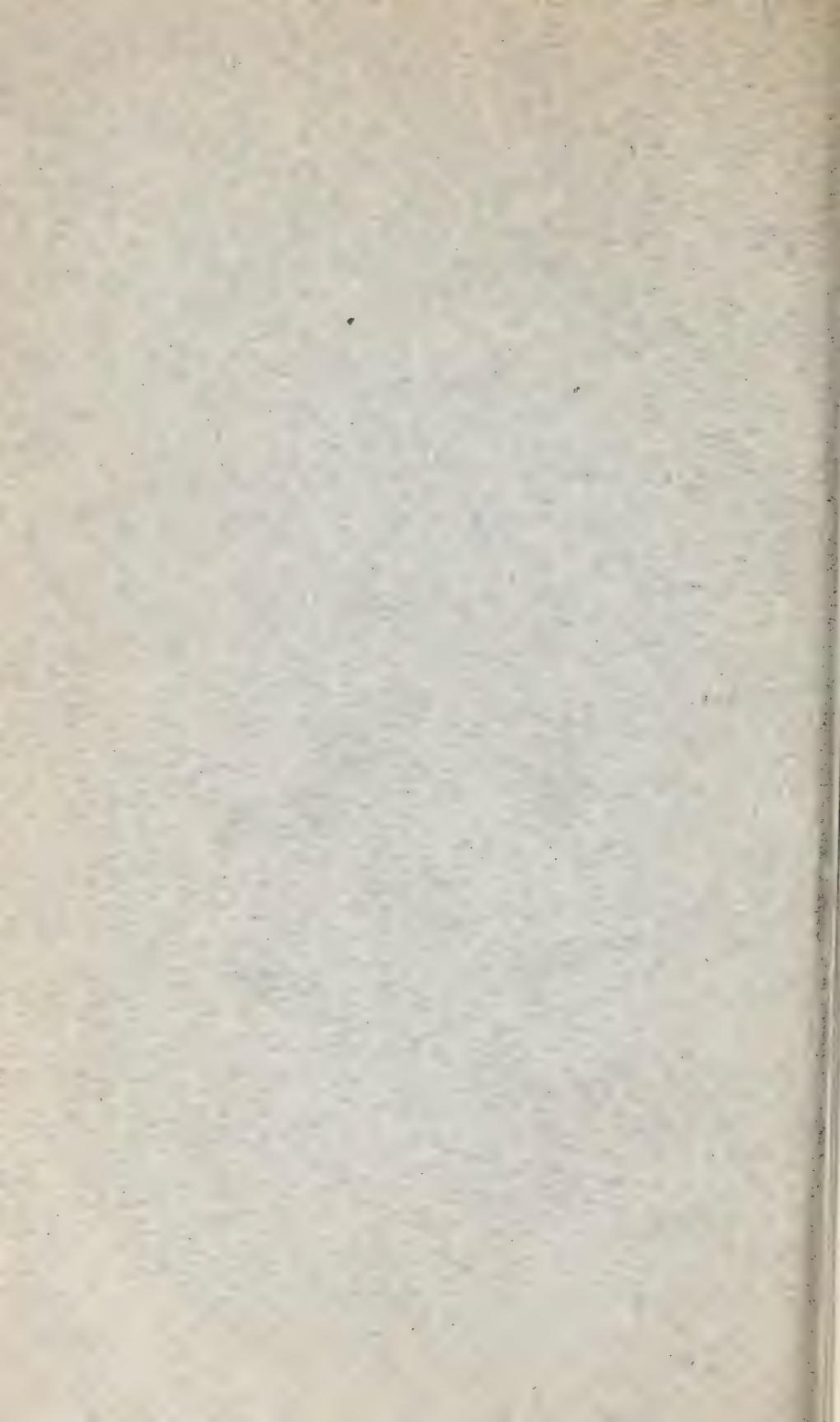
APPELLANT'S BRIEF

KOLLOCK, ZOLLINGER & McDOWALL,
Attorneys and Solicitors for Appellant.
BEACH, SIMON & NELSON,
SIDNEY TEISER,
Attorneys and Solicitors for Respondents.

Filed

JAN 25 1915

E. D. Monckton,



No. 2534

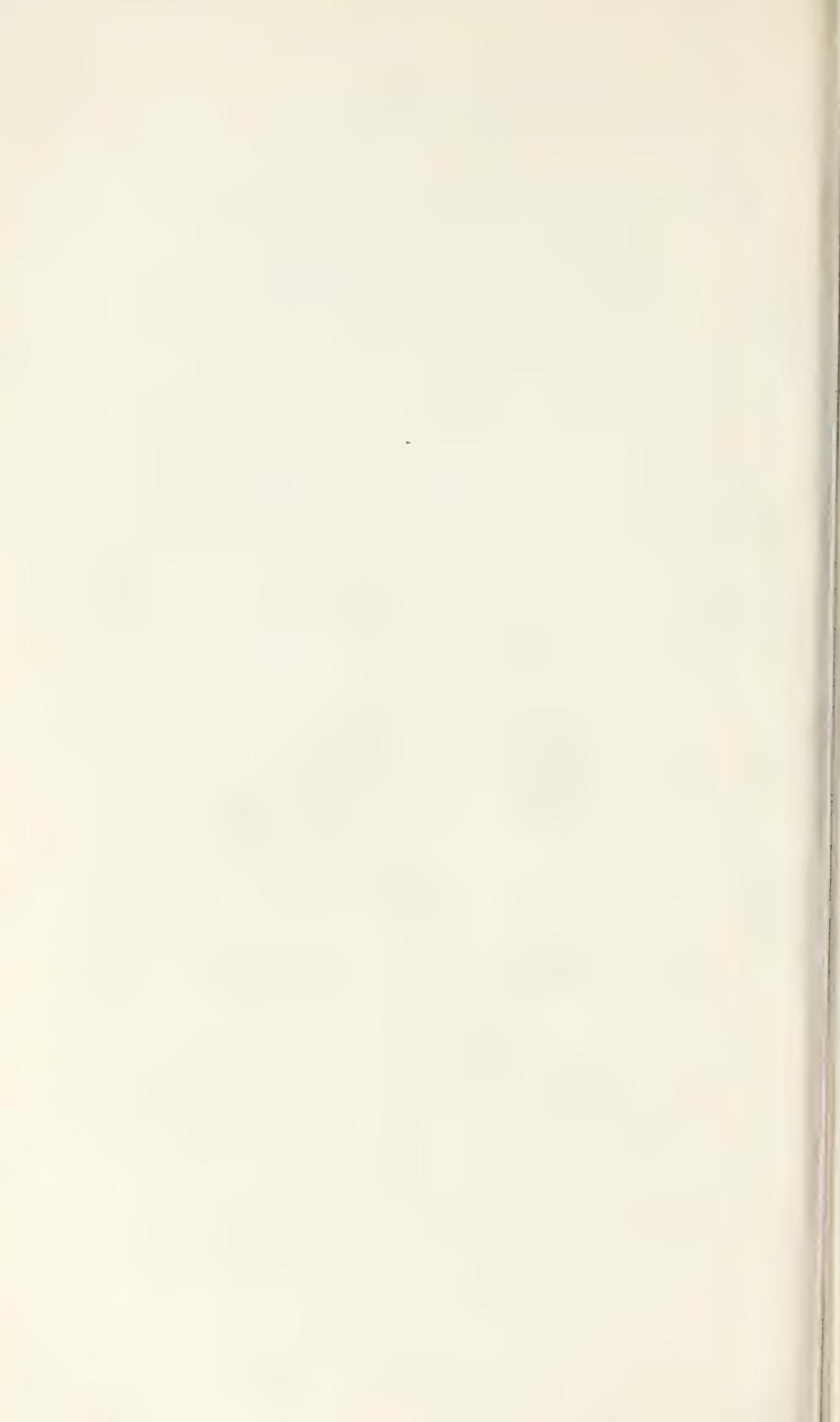
**In the Circuit Court of Appeals of the
United States**

FOR THE NINTH CIRCUIT

LARKIN-GREEN LOGGING COMPANY,
a corporation, *Appellant-Defendant,*
vs.
R. L. SABIN, Trustee in Bankruptcy of the Estate
of CONSUMERS LUMBER & SUPPLY
COMPANY, a corporation,
Respondent-Plaintiff.

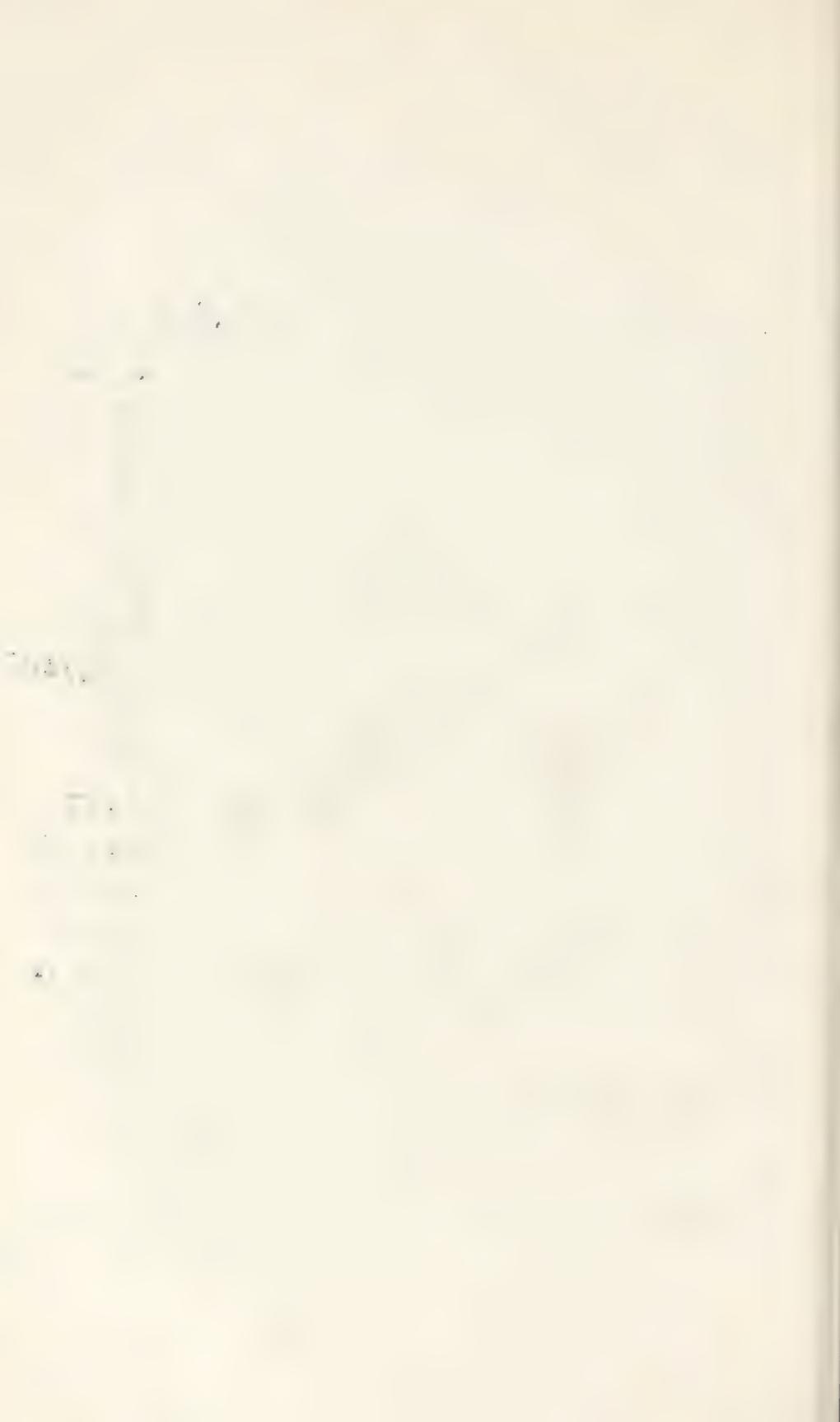
APPELLANT'S BRIEF

KOLLOCK, ZOLLINGER & McDOWALL,
Attorneys and Solicitors for Appellant.
BEACH, SIMON & NELSON,
SIDNEY TEISER,
Attorneys and Solicitors for Respondents.



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In the Circuit Court of Appeals of the United
States for the Ninth Circuit

LARKIN-GREEN LOGGING COMPANY,
a corporation, *Appellant-Defendant,*
vs.
R. L. SABIN, Trustee in Bankruptcy of the Estate
of CONSUMERS LUMBER & SUPPLY
COMPANY, a corporation,
Respondent-Plaintiff.

APPELLANT'S BRIEF

STATEMENT OF FACTS

On December 18, 1912, Larkin-Green Logging Company, a corporation, appellant-defendant herein, instituted an action at law in the Circuit Court of the State of Oregon for Multnomah County against Consumers Lumber & Supply Company, and a writ of attachment was duly issued therein, and levy under said writ was duly made by the Sheriff of Multnomah County, Oregon, on all the property, real and personal, of said Consumers Lumber & Supply Company. The property remained in the actual and constructive possession of the Sheriff under said writ of attachment, to April 17, 1913.

On April 17, 1913, there was filed in the above

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entitled court, sitting as a court of bankruptcy, the petition in involuntary bankruptcy of E. C. Atkins & Company, a corporation, and others, against said Consumers Lumber & Supply Company, praying that said corporation might be adjudicated a bankrupt.

The petition which is set forth in full in the complaint herein, after alleging the incorporation, the indebtedness and the insolvency of the Consumers Lumber & Supply Company, makes the following allegation as an allegation of an act of bankruptcy:

“That within four months next preceding the date of this petition, the said Consumers Lumber and Supply Company committed an act of bankruptcy in that it allowed Larkin-Green Logging Company to levy an attachment on all of the assets and property of said Consumers Lumber & Supply Company, which attachment has never been released or discharged or vacated, and which attachment was levied on December 18, 1912, and will become a prior lien and cannot be removed or set aside or dissolved through bankruptcy proceedings after April 18, 1913; that said Consumers Lumber & Supply Company has done nothing to vacate or set aside said attachment and has not gone into bankruptcy voluntarily, and its failure to do so will thereby create a preference in favor of said Larkin-Green Logging Company

on said December 18, 1912. Said attachment is still a lien on all of the assets of said debtors."

A demurrer to the petition was filed by Larkin-Green Logging Company, intervening for that purpose, which demurrer was overruled. Thereafter claims of creditors were proved before the referee, including the claim of appellant. A trustee was appointed, and the respondent herein was subsequently elected trustee on the resignation of the former trustee. The appellant, believing the bankruptcy proceedings to be void under a recent decision of the Supreme Court of the United States, continued the original action in the State Court, and is proceeding to sell the property on execution. This suit is instituted for the purpose of enjoining the threatened sale. The motion of appellant to dismiss the complaint was denied by the District Court, and from that decision this appeal has been perfected.

POINTS AND AUTHORITIES

I.

The Statute.

National Bankruptcy Act, 1898.

Acts of Bankruptcy, Section 3, a (3).

"Act a of bankruptcy by a person shall consist of his having * * * suffered or permitted while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or

final disposition of any property affected by such preference, vacated or discharged such preference."

Process, Pleadings and Adjudications.

Section 18 a.

"Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits to enforce a legal or equitable lien in courts of the United States, except that, unless the judge shall otherwise direct, the order shall be published not more than once a week for two consecutive weeks, and the return day shall be ten days after the last publication unless the judge shall for cause fix a longer time."

Section 19 a.

"A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided

and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed."

II.

Jurisdiction.

1. In General.

Collier on Bankruptcy, 10th Ed. p. 23 c.
Bardes v. Hawarden Bank, 178 U. S. 524.
Loveland on Bankruptcy, 4th Ed. Sec. 191.

2. Invoked by Filing Petition.

Collier on Bankruptcy, 10th Ed. p. 73.
Collier on Bankruptcy, 10th Ed. p. 413 f.
Loveland on Bankruptcy, 4th Ed. Vol. 1,
Section 29.
Loveland on Bankruptcy, 4th Ed. Vol. 1,
Section 30.
In re First National Bank of Belle Fouche,
152 Fed. 64.
In re Kindt, 98 Fed. 867.

III.

Adjudication, if within the jurisdiction of the court, is voidable upon direct attack but conclusive against collateral attack; if not within the jurisdiction and the record affirmatively shows the lack of jurisdiction, it is void for all purposes.

Collier on Bankruptcy, 10th Ed. p. 436.
Loveland on Bankruptcy, 4th Ed. Sections
234, 244.
Metcalf v. Watertown, 128 U. S. 586.
Railway Co. v. Ramsey, 89 U. S. 322.
In re Plotke, 104 Fed. 964.
St. L. R. R. Co. v. Pacific Ry. Co., 52 Fed.
770.

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- Adams v. Terrell, 4 Fed. 796, 800.
Williamson v. Berry, 8 Peters, 540.
Elliott v. Piersol, 1 Peters, 328.
United States v. Arrondondo, 6 Peters, 691.
Voorhees v. Bank of United States, 10
Peters, 475.
Thompson v. Whitman, 18 Wall. 570.
Knowles v. Gaslight & Coke Co., 19 Wall. 58.
Elwood v. Northrup, 106 N. Y. 172.
Natell v. Torey, 65 N. Y. 294.

IV.

The petition for involuntary bankruptcy filed against Consumers Lumber & Supply Company and upon which adjudication was made alleged but one act as an act of bankruptcy, and that is not an act of bankruptcy under the statute.

Citizens Banking Co. v. Ravenna National
Bank, U. S. Adv. Ops. 1913, pp. 807, 809.
Oral Findings of the District Court in the
case at bar.

V.

The adjudication was null and void, and is therefore subject even to collateral attack.

- In re New York Tunnel Co., 21 Amer. Bktcy.
Rep. 531, 166 Fed. 84.
In re Elmira Steel Co., 5 Amer. Bktcy. Rep.
484, 109 Fed. 456.
In re Columbia Real Estate Co., 4 Amer.
Bktcy. Rep. 416, 101 Fed. 970.
Reynolds v. Stockton, 140 U. S. 270.
In re Stein, 130 Fed. 377.
Thatcher v. Powell, 6 Wheaton, 119.
Noble v. Union River Logging Co., 147 U. S.
173.
Rich v. Meutz Township, 134 U. S. 632.

Murray v. American Surety Co. of New York, 70 Fed. 341.
Settlemeier v. Sullivan, 97 U. S. 444-449.
Galpin v. Page, 18 Wall. 366.
In re Sawyer, 124 U. S. 200.
Elliott v. Piersol, 1 Peters, 328, 340.
Wilcox v. Jackson, 13 Peters, 498, 511.
Hickey v. Stewart, 3 Howard, 750, 762.
Thompson v. Whitman, 18 Wall. 457, 467.
In re Louisell Lumber Co., 209 Fed. 785.

VI.

A want of jurisdiction affirmatively appearing on the face of the record cannot be cured, nor a judgment rendered on such record validated by consent appearance, ratification or estoppel.

Metcalf v. Watertown, 128 U. S. 586.
Bank v. Calhoun, 102 U. S. 260.
State v. Judge of 2nd Judicial District, 13 La. An. 89.
Burkle v. Eckart, 3 N. Y. 132.
Ansonia Brass & Copper Co. v. New Lamp Chimney Co., 64 Barb. 435.
Johnson v. Ball, 15 N. H. 407.
Central Trust Co. v. Virginia Steel & Iron Co., 55 Fed. 769.
State v. Tolleston Club, 53 Fed. 18.

ARGUMENT

The decision of the trial court rests upon the syllogism that courts of bankruptcy are courts of general, although limited, jurisdiction; that their judgments possess the attributes of finality and estoppel which pertains to those of courts of general jurisdiction; that the adjudication in bankruptcy was within the jurisdiction of the court, and

that it is, therefore, valid as against collateral attack.

Appellant's position in the lower court and on this appeal is, that upon the fact of the record in the bankruptcy proceedings, it affirmatively appears that the District Court of the United States, sitting as a Court of Bankruptcy, was wholly without jurisdiction to entertain the petition for involuntary bankruptcy filed by creditors of the Consumers Lumber & Supply Company, to adjudicate it a bankrupt, to appoint a trustee, or to take any steps whatever in the premises; that the adjudication is null and void for any and all purposes, at any time, and that it cannot be cured or rendered valid or enforceable by the consent or appearance of the appellant, nor on any theory of ratification or estoppel.

It may definitely be understood that appellant's attack upon the judgment or adjudication of the Court of Bankruptcy is a collateral attack and that it must sustain the burden incident thereto.

To the major premise of the decision of the Honorable District Court, appellant takes no objection. It is respectfully urged that the minor premise and, therefore, the conclusion are erroneous.

Upon the question whether the failure of a debtor, for a period of one day less than four months after a levy upon his property, to vacate or discharge such levy, is a final disposition of the property affected by the levy, within the meaning of the provisions of the Bankruptcy Act just quoted, was a

matter very considerably in doubt at the time of the filing of the petition hereinabove referred to.

In Folger v. Putnam, 114 C. C. A. 513, 194 Fed. 793, at page 797, it was held by the Circuit Court of Appeals, for this circuit, that such failure was in itself an act of bankruptcy, and it was upon the strength of that decision that the demurrer of this appellant to the petition in bankruptcy was overruled.

The recent case of Citizens Banking Company v. Ravenna National Bank, U. S. Adv. Ops. 1913, pp. 807, 809, definitely settled the question and answers in the negative the following questions, certified to the court by the Circuit Court of Appeals for the Sixth Circuit:

1. Whether the failure by an insolvent judgment debtor, and for a period of one day less than four months after the levy of an execution upon his real estate, to vacate or discharge such levy, is a final disposition of the property affected by the levy, under the provisions of Section 3 a (3) of the Bankruptcy Act of 1898;

2. Whether an insolvent debtor commits an act of bankruptcy, rendering him subject to involuntary adjudication as a bankrupt under the Bankruptcy Act of 1898, merely by inaction for the period of four months after the levy of an execution upon his real estate.

The court says:

"We conclude that both of the questions pro-

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pounded by the Circuit Court of Appeals should be resolved in the negative."

It is thus definitely determined that the only act of bankruptcy alleged in the petition is not an act of bankruptcy, and the Honorable District Court, in the decision from which this appeal is perfected, expressly states that the former decision of the court, overruling the demurrer to the petition, was erroneous under the doctrine now definitely established by the Supreme Court of the United States.

The jurisdiction of all courts of the United States, and especially of the District Courts sitting as Courts of Bankruptcy, is only such as is conferred upon them by the express provision of the United States Constitution and Acts of Congress.

Collier, in his authoritative work on "Bankruptcy," says: (10th Ed. p. 73)

"In most of the continental bankruptcy systems, acts of bankruptcy, in our sense of the term, are unknown. Mere cessation of payment is enough to entitle the creditors to resort to the court. In France the debtor is legally bound to notify the court that he has stopped payment. Indeed, in several of the Latin systems, the court may declare a debtor a bankrupt on its own motion. Anglo-Saxon jurisprudence, while allowing the debtor to initiate bankruptcy by his own declaration or petition, not only does not otherwise permit the court to adjudicate save at the instance of creditors, but even affords further protection

against arbitrary or unjust interference with the property of the individual by providing that he shall not be amenable to bankruptcy unless he has done or suffered certain acts, which either amount to actual or constructive fraud on creditors, or are tantamount to declarations of hopeless insolvency. These acts are called under our present statute, acts of bankruptcy."

(Page 23 c).

"The origin of courts of bankruptcy is statutory and they have no powers or jurisdiction other than is conferred on them by or necessarily implied from the statute. Their jurisdiction is limited, that is, limited in respect to the subjects over which they may exercise jurisdiction. In respect to the matters coming within their jurisdiction, their judgments possess every attribute of finality and estoppel which pertains to those of courts of general jurisdiction."

In Loveland on Bankruptcy we find the following statement (Section 191):

"To warrant or justify the institution of involuntary proceedings against a debtor, three things must concur with reference to such debtor. First, the debtor must be within the class subject to the provisions and entitled to the benefits of the statute as an individual bankrupt. Second, he must owe debts to the

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amount of \$1000 or over. Third, he must have committed an act of bankruptcy within four months prior to the filing of the petition. These facts are jurisdictional and must all exist in order to give the court power to adjudicate the debtor a bankrupt. If any one of these three things does not exist, the proceeding fails."

The jurisdiction of the court to hear and determine is invoked, in an action at law or suit in equity, by filing the complaint or bill; in a criminal proceeding, by the indictment; in a proceeding in involuntary bankruptcy, by filing the petition in bankruptcy.

Loveland on Bankruptcy (4th Ed. Vol. 1, Section 29) says:

"The jurisdiction of the court is invoked in bankruptcy by filing a petition to take the benefit of the act. It may be said generally that the bankruptcy jurisdiction may be exercised upon a petition, motion, ruling to show cause, or other summary proceedings."

(Section 30).

"The jurisdiction of a court of bankruptcy is invoked by a debtor or his creditor filing a petition to take the benefit of the act. Proceedings in bankruptcy are commenced when the petition is filed and before the subpoena is issued or served. The effect of filing the petition is to give the court jurisdiction of the case and to bring the estate immediately within the

custody of the court and to subject it to its administration. The moment the petition is filed the jurisdiction of the court attaches and extends over the estate with power to restrain any act which will interfere with its administration in bankruptcy."

Collier on Bankruptcy, 10th Ed. (page 413 f) says:

"Petition confers jurisdiction. The moment the petition is filed jurisdiction begins. This is the commencement of the proceeding even though the subpoena does not immediately issue, or if issued is not served within the time limited. As has been stated in a recent case (*Board of County Commissioners v. Hurley*, 169 Fed. 92), 'Indeed, the condition at the time of filing of the petition measures the extent of the estate and the rights of all creditors of the bankrupt and all persons interested in the property throughout all the provisions of the law. So far as the jurisdiction of the court is concerned, the filing of the petition operates as a *lis pendens* and is notice to all the world. This is in recognition of the often repeated maxim that the filing of a petition in bankruptcy is a caveat to all the world, and in effect an attachment and injunction.'"

It has been argued that these statements of the learned text writers are erroneous—that the jurisdiction is conferred by the statute and is effective

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upon service of the subpoena. This, we submit, is a mere playing with words. General jurisdiction to adjudicate bankrupt is undoubtedly conferred by the statute, and jurisdiction over the person is only consummated by the service of process, but the jurisdiction conferred by the statute can operate only when invoked by a proper pleading.

Judge Shiras, in *In re Kindt*, 98 Fed. 867, uses this language:

“When the petition and schedule duly signed and sworn to by the bankrupt were filed in the clerk’s court, the jurisdiction over the case and over the person of the bankrupt was acquired by the court. The jurisdiction was acquired by the filing of the petition.”

In *Griffith v. Frazier*, 8 Cranch, 9, Chief Justice Marshall had before him for consideration the judgment of the “ordinary” or probate court of Georgia, appointing an executor. The jurisdiction to appoint executors was unquestionably vested in the court by the statute, and the great founder of American jurisprudence says:

“The well-known distinction between an erroneous act or judgment by a tribunal having cognizance of the subject matter and the act or judgment of a tribunal having no cognizance of a subject is not denied, but it is contended that the ordinary had jurisdiction in this case. The ordinary in South Carolina is the court in which wills are proved, in which letters testa-

mentary and letters of administration are granted; he judges whether the applicant be entitled to administration or not and rejects or admits the claim according to his opinion of the law. Whether his judgment be correct or not, still it is his judgment and when exercised upon an application for administration it is exercised upon subject cognizable in his court. That he grants letters of administration proves that he has jurisdiction in such cases, and if he grants administration in one of them improperly, the judgment is erroneous and voidable, but not void. This argument has been very strongly urged and there is great force in it. The difficulty of distinguishing those cases in which a court having general testamentary jurisdiction may have been said to have acted on a matter not within its cognizance, is perceived and felt, but the difficulty of marking the line does not prove that no such line exists. Illustration—the appointment of an administrator for a man not dead; the appointment of an administrator where the executor is present and qualified. A majority of the court is of opinion that administration was granted by a court having no jurisdiction in the particular case, and is therefore absolutely void."

In *In re Sawyer*, 124 U. S. 200, the circuit court had enjoined certain state officers from performing duties of offices to which they claimed to have been

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legally elected. Injunction is an equitable remedy vested generally in Circuit Courts of the United States by the statutes creating those courts. Mr. Justice Grey says:

"The Circuit Court of the United States was without jurisdiction or authority to entertain the bill in equity for an injunction. As this court has often said, where a court has jurisdiction it has a right to decide every question which occurs in the case, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; but if it acts without authority, its judgments and orders are regarded nullities. They are not voidable but simply void. Elliott v. Piersol, 1 Peters, 328, 340; Wilcox v. Jackson, 13 Peters, 498, 511; Hickey v. Stewart, 3 Howard, 750, 762; Thompson v. Whitman, 18 Wall. 457, 467. The case cannot be distinguished in principle from that of a judgment of the common bench in England in a criminal prosecution which was *coram non judice*, or the case of a sentence passed by the Circuit Court of the United States upon a charge of an infamous crime without a presentment or indictment by a grand jury. The Circuit Court being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumes are null and void."

In Rich v. Mentz Township, 134 U. S. 632, the County Judge of a New York county had entered an order or judgment on petition of taxpayers that certain bonds should be issued. The jurisdiction to hear and determine on such petition was expressly vested in the court by special statute. The court says:

"It is forcibly argued that the judgment of the county judge is not open to collateral attack, but this assumes that the jurisdiction of the county judge has been properly invoked, and has no application where that is not the case. Proof as to the allegations of this petition may have been taken; such proof did not necessarily involve an inquiry into whether a part of the petitioning taxpayers were such because of the payment of highway taxes or taxes on dogs, and, as we have stated, the judgment does not in terms say that such were not included. The authority conferred by the act must be exercised in strict conformity to and by a rigid compliance with the letter and spirit of the statute. As on the face of these proceedings there was an entire want of power to issue the bonds, no reference to the doctrine of estoppel need be made."

We submit, therefore, that the jurisdiction of United States District Courts, sitting as Courts of Bankruptcy, is conferred, defined and limited by the statute, but before a judgment or adjudication can be entered, which will have any effect and be other than a mere nullity, a petition must be filed

We would call the court's attention to the fact that in the case at bar, although no amendment was sought, an allegation is made in the pleading that the bankrupt, after the filing of the petition and more than four months after the date of the attachment of appellant's lien, filed its written acknowledgment of insolvency and its willingness to be adjudicated a bankrupt. *Louisell Lumber Company*, *supra*. The case is, therefore on all fours with the case at bar, and has direct application to the suggestion of the lower court that an amendment might have been made.

The oral findings of the District Court cite many authorities to the effect that the judgment of the court is conclusive against collateral attack, but we respectfully submit that a critical analysis will show that no one of them will sustain the decision of the court in the case at bar.

We believe all the cases cited by the court and all adjudicated cases holding valid as against collateral attack erroneous adjudications in bankruptcy fall into one of three classes:

First: Where the petition contains in proper and legal form all the necessary allegations, and, after adjudication, it is sought in a collateral proceeding to contravert the facts alleged in the petition and established by the adjudication;

Second: Where the allegations of the petition are defective and insufficient upon demurrer or direct attack, but may be deemed cured by testimony;

Third: Where the petition fails to allege jurisdictional facts such as residence or amount of claims, and the court having entered judgment thereon, it must be presumed that the court had heard and determined such jurisdictional facts affirmatively.

The distinction between cases falling under one of these classes and cases where a total want of jurisdiction appears affirmatively on the face of the record is clearly set forth in many adjudicated cases.

In the case of *Matter of New York Tunnel Company*, 21 Am. Bankruptcy Rep. 531; 166 Fed., Vol. 84, in the Circuit Court of Appeals, before Judges LaCombe, Cox and Ward, the opinion written by Judge Ward, makes the following critical distinction between proceedings and adjudications purely void and those which are merely erroneous:

“If a petition for adjudication were made by only two creditors, the law requiring three, there would be a jurisdictional defect on the face of the record, making any adjudication void. On the other hand, if the aggregate amount of claims were stated to be \$500 as required by law, and because of setoffs or other reasons was in point of fact less, an adjudication would be an error to be corrected by appeal. So, if the petition were against a railroad company there would be *on the face of the record* such a jurisdictional defect as would make the adjudication void; whereas, if the

corporation might or might not be considered within the Act, and adjudication, even if erroneous, would have to be corrected by appeal."

The case, *In re Elmira Steel Company*, 5 Amer. Bankruptcy Rep. 484; 109 Fed. 456, from the Western District of New York, contains an exceedingly interesting discussion on this question.

The opinion is written by Referee Munn and was adopted by Judge Hazlett, District Judge, in its entirety.

It appears from the opinion that a petition in involuntary bankruptcy was filed in the U. S. District Court for the Western District of New York, December 18, 1900, reciting that the alleged bankrupt was a corporation, organized and existing under the laws of the State of New York. On January 5, 1901, the alleged bankrupt filed its answer, reciting that on January 3, 1901, in an involuntary proceeding instituted against it in the Eastern District of Pennsylvania it had been adjudicated a bankrupt. It became necessary for the Referee to determine the question as to the status of the proceedings in the Pennsylvania court. At page 496, referring to the petition in the New York court, the Referee uses this language:

"The petition fails to state any length of time during which the bankrupt has had its principal place of business, domicile or residence within the Western District of New York. No objection was made. Nevertheless, as the defect in the petition affects the question

of jurisdiction, it needs to be considered, and it would be fatal to the further maintenance of this proceeding *if it had not been supplied upon trial.*"

He then finds as a fact that the omission in the petition was supplied by evidence on trial.

In reference to the petition in the Eastern Pennsylvania District Court, the Referee uses this language:

"The petition in the Eastern Pennsylvania District Court contains no allegation whatever as to the character of the corporation against which it was directed. The conclusion is irresistible that this petition conferred no jurisdiction whatever upon the Eastern Pennsylvania District Court, and that all proceedings therein, including the adjudication made upon that petition and upon all subsequent proceedings which have been made or may be had thereunder, including the appointment of receivers, and the appointment of a trustee, if any, and his title, are absolutely void as against any person who anywhere or at any time may raise the objection."

In Encyclopaedia of United States Supreme Court Reports, Vol. 7, page 743, we find the following language:

"The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect

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to jurisdictional facts concerning which the record is silent. Hence, when a judgment of a court of superior authority is attacked collaterally for the want of jurisdiction, such a presumption cannot be indulged when it affirmatively appears from the pleadings or evidence that jurisdiction was wanting. Where the special powers conferred upon a court of general jurisdiction are exercised in a special manner, not according to the course of the common law; or where the general powers of the court are exercised over a class not within its ordinary jurisdiction, upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court."

In re Stein, 130 Fed. 377:

"The reason given for their omission" (certain claims of creditors) "cannot affect the question of the validity of the petition as a basis for invoking the jurisdiction of the court. The law requires that there shall be certain averments specified by the Bankruptcy Act of July 1, 1898, Chap. 541, and if they are omitted the court has no jurisdiction in the matter. Amendment to the petition refused."

Murray v. American Surety Company of New York, 70 Fed. 341, before this court, was an action on two bonds executed by the defendant. The plaintiff had been appointed receiver by the Superior Court of San Diego County, State of California.

There, as in the case at bar, the plea was to the jurisdiction of the court in appointing the plaintiff to the office. The court speaking by Judge Hawley says:

"In whatever light this question may be viewed, we are directly face to face with the unquestioned rule of law that in all special statutory proceedings the measure of the court's power is the statute itself. Whatever steps are provided for by the statute may be taken by the court and no matter how irregular or erroneous its action may be in regard thereto, it is conclusive until reversed upon appeal, and cannot be collaterally assailed; but the judgment of the court having no jurisdiction of the subject matter or the parties, or the exercise of a power by a court not authorized by the statute, in purely statutory proceedings, is utterly null and void and may be collaterally assailed."

In *Settlemeier v. Sullivan*, 97 U. S. 444-449, Mr. Justice Field says:

"We do not question the doctrine that a court of general jurisdiction, acting within the scope of its authority, that is, within the boundaries which the law assigns to it with respect to subjects and persons, is presumed to act rightly and to have jurisdiction of the judgment it pronounces until the contrary appears, but this presumption can only arise with respect to jurisdictional facts concerning which the record

is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record gives the evidence or makes an averment with respect to a jurisdictional fact, it will be taken to speak the truth and the whole truth in that record, and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than as averred."

In *Galpin v. Page*, 18 Wall. 366, we find the following statement:

"If it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or if it appears in like manner that the service was made upon a person other than the defendant, it will not be presumed in the silence of the record that it was made upon the defendant also."

The correct principle we believe to be clearly expressed by Mr. Loveland (Bankruptcy, Sections 243, 244) as follows:

"An adjudication is conclusive only as to facts directly and distinctly put in issue and the finding of which is necessary to uphold the adjudication. An adjudication which is correct in form and made by a court having jurisdiction of

the bankrupt is binding and conclusive on the bankrupt and creditors. If the record shows a lack of jurisdiction, the adjudication is null and void and may be assailed in a collateral proceeding. In order to render an adjudication void, the absence of jurisdiction must affirmatively appear on the record. This may occur where an adjudication is made upon the petition of two creditors, the law requiring three, or where the petition is filed against a farmer or wage earner or a municipal, railroad, insurance or banking corporation, being expressly exempt from bankruptcy by the Act; or where it appears that the debtor has not had his residence, domicile or place of business within the district the requisite length of time; or that the petitioner's debts do not amount to \$500; or that the total indebtedness of the alleged bankrupt is less than \$1000. But if an issue of fact is made concerning these matters, the adjudication is not void. The decision of such issues may be erroneous and invalid. The distinction, therefore, between a void and invalid adjudication is important. If the record shows an absence of jurisdiction, the adjudication is void. In such cases it is never too late to make the objection that the court is without jurisdiction, and the adjudication may be even collaterally attacked. In the one case the court acts without authority and the action of the court is void; in the other, the court only errs

in judgment upon a question properly before the court for adjudication, and, of course, the order of the court is only voidable.'

It is said that appellant is barred by the doctrine of *res adjudicata*; that appellant's debtor, Consumers Lumber & Supply Company, has been adjudicated a bankrupt. By the terms of the statute one only can be adjudicated bankrupt, on involuntary petition, who has committed an act of bankruptcy defined in the Act. Is the fact, then, established by this adjudication that the Consumers Lumber & Supply Company committed the act of bankruptcy alleged in the petition? But that act, the Supreme Court of the United States has held is not an act of bankruptcy. Is it established by this adjudication that it committed some other act? But no other is alleged.

It is suggested that the appellant is barred because, after its demurrer to the petition was overruled, it participated in the bankruptcy proceedings. This would unquestionably be the result of the appearance if the adjudication were merely voidable. We submit, however, that in the citation of authorities, in support of this proposition, the clear distinction between judgments that are merely erroneous and voidable and those wholly without jurisdiction and void, is overlooked. To draw an analogy which at first presentation seems strained, but which on critical examination we believe to be exact and fair—Assume an indictment in a United States District Court, charging a person with the

common law crime of robbery, in having by force or putting in fear feloniously taken property from the person or another, and with no reference in the indictment to a specific United States statute; in ignorance of the law, under the advice of misinformed counsel, the defendant pleads guilty and is sentenced to imprisonment—would not the judgment be absolutely void and subject even to collateral attack in spite of the adjudication and in spite of his appearance and consent?

In *In re Coy*, 127 U. S. 731, 757, the court says:

“It certainly was not intended to say that because a Federal Court tries a prisoner for an ordinary common law offense, as burglary, assault and battery, or larceny, with no averment or proof of any offense against the United States or any connection with any statute of the United States, and punishes him by imprisonment, he cannot be released by habeas corpus because the court which tried him had assumed jurisdiction, that its judgment was not subject to collateral attack.”

It was said in *Metcalf v. Watertown*, 128 U. S. 586:

“Want of jurisdiction is a question that the court should consider wherever and however raised, even if the parties forbear to make it or consent that the case may be considered on its merits.”

In that case there was an express stipulation that the case be tried on its merits, but it was dismissed on the court's own motion, its attention having been attracted to a want of jurisdiction appearing on the face of the record in reference to the residence of the parties.

"Where residence is a necessary prerequisite to jurisdiction, the fact that a defendant living outside of the circuit, appears by his solicitor and confesses the bill will not confer upon the court jurisdiction."

State v. Judge of 2nd Judicial Court, 13 La. Annual 89.

"Consent will not confer jurisdiction on a court which does not possess it otherwise."

Burkle v. Eckert, 3 N. Y. 132.

"Proof by creditors of their claim in proceedings in bankruptcy will not give jurisdiction to a bankrupt court if it does not already possess it."

Ansonia Brass & Copper Co. v. New Lamp Chimney Co., 64 Barber, 435.

In the case of *Johnson v. Ball*, 15 N. H. 407, the Supreme Court of New Hampshire held that, bankruptcy having been pleaded as a defense, and it appearing on the face of the record that the petition in bankruptcy lacked an averment of residence, it was invalid and afforded no defense in an action upon the debt which otherwise would be discharged.

"The jurisdiction of a bankruptcy court must affirmatively appear from the face of its record."

In re Plotke, 104 Fed. 964.

"If upon the face of the record a judgment is shown to have been rendered without jurisdiction of the subject matter or the parties, it will be treated as a nullity whenever or however drawn in question."

In re Columbia R. E. Co., 4 Amer. Bankruptcy Rep. 416.

"It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case."

Bank v. Calhoun, 102 U. S. 260. ..

In the case of *Central Trust Company v. Virginia Steel & Iron Company*, 55 Fed. 769, it appeared that the defendant company had appeared in the case and consented to the appointment of receivers requested by the plaintiff. It subsequently developed that neither plaintiff nor defendant was a resident of the district. The court on its own motion entered an order vacating the order appointing the receivers, discharging the receivers and dismissing the suit.

In *State v. Tolleston Club*, 53 Fed. 18, the court says:

"The want of jurisdiction is affirmatively shown on the face of the record. In such case neither silence nor positive consent will confer

jurisdiction because the parties cannot confer on the court jurisdiction denied to it by the statute."

From the foregoing we believe the following principles of law applicable to this case to be deducible:

1. The petition in bankruptcy failed to allege an act of bankruptcy under the bankruptcy law;

2. The United States District Court for the District of Oregon, sitting as a court of bankruptcy, acquired no jurisdiction to entertain the petition, to adjudge the Consumers Lumber & Supply Company a bankrupt, or to appoint a trustee;

3. Neither the appearance of the Larkin-Green Logging Company, defendant and appellant herein, by its demurrer to the petition, nor the filing and proof of its claim as a creditor, could confer jurisdiction upon the court which it did not acquire by the filing of the petition;

4. The adjudication and all proceedings thereunder are absolutely null and void and may be called in question by any person at any time and in any manner;

5. The plaintiff and respondent herein, being appointed under a void adjudication, is not legally a trustee in bankruptcy and has no legal capacity to sue as a trustee in bankruptcy or to prosecute this suit against this defendant-appellant;

6. The complaint herein should have been dismissed and an order entered in the bankruptcy proceedings dismissing the same with all proceedings thereunder;

7. The District Court erred in denying appellant's motion to dismiss the bill.

Respectfully submitted,

KOLLOCK, ZOLLINGER & McDOWALL,
Solicitors for Appellant.

NO. 2534

United States
Circuit Court of Appeals
For the Ninth Circuit

LARKIN-GREEN LOGGING COMPANY, a Corporation,

Appellant,

vs.

R. L. SABIN, as Trustee in Bankruptcy of the
Estate of CONSUMERS' LUMBER & SUPPLY
COMPANY, a Corporation,

Respondent.

BRIEF OF RESPONDENT.

BEACH, SIMON & NELSON, and
SIDNEY TEISER,

Attorneys for Respondent.

KOLLOCK, ZOLLINGER & McDOWALL,

Attorneys for Appellant.

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Walter

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BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

The statement of facts as contained in appellant's brief is essentially correct. However, it is deemed advisable to state the facts from a different angle and according to the manner in which the questions arose in this case.

Respondent, R. L. Sabin, was elected trustee in bankruptcy of this estate to supplant a former trustee, who had resigned because of criticism concerning his

inactivity. Upon his election there was turned over to him certain property consisting of a lumber mill near Portland, Oregon. After taking possession of the same the trustee found that an execution was being demanded in the State Court by the appellant upon a judgment obtained by it against the bankrupt, within four months of the filing of the petition in bankruptcy, and that the sheriff had been requested to make sale of said property, which had been attached by appellant prior to the obtaining of its judgment. Thereupon, respondent petitioned and procured from the District Court authority to institute suit against appellant for the purpose of enjoining it from proceeding with its execution sale, and this suit was accordingly instituted. (See Amended Complaint, Transcript of Record, pp. 3 to 25.)

The amended complaint in this suit set forth the *Petition in Bankruptcy* filed against the Consumers' Lumber & Supply Company (Transcript of Record, pp. 4 to 10); the *Demurrer* of the Larkin-Green Logging Company to said petition in bankruptcy (Transcript of Record, pp. 11 to 12); the *Decision* of the District Court *overruling* said demurrer (Transcript of Record, p. 13); the *Answer* of the bankrupt admitting the allegations of said petition in bankruptcy and praying to be adjudged a bankrupt (Transcript of Record, p. 14); the *Adjudication* in bankruptcy by said court (Transcript of Record, p. 15); the fact that *no* motion had been filed to vacate, set aside, or modify said adjudication; that *no appeal* or writ of error or writ of review had been taken from said order of adjudication or from

any proceeding in said bankruptcy cause; and that said adjudication had *not* been vacated, set aside, or modified (Transcript of Record, p. 16); the *Reference* of said cause to the referee in bankruptcy (Transcript of Record, p. 16); and the *Proof of Claim* filed by appellant with said referee in said cause as an *unsecured* claim (Transcript of Record, pp. 16 to 21); the fact that the claim made in said proof was the *same* claim upon which suit had been instituted in the State Court and attachment issued and execution threatened (Transcript of Record, p. 21); the fact that the appellant *participated in the election of a trustee* at the first meeting of creditors in said bankruptcy cause as an *unsecured creditor* (Transcript of Record, p. 21); the *qualification of the trustee* (Transcript of Record, p. 22), and his authority to make sale of the property involved (Transcript of Record, p. 22); the fact that the trustee was embarrassed and *deterrred in making suitable sale* by the action of the appellant, *a year and a half subsequent to the adjudication*, in asserting its claim by reason of said attachment and in threatening execution and sale under its judgment (Transcript of Record, p. 23); and the *authority of the trustee to sue* (Transcript of Record, p. 24.)

The appellant moved to dismiss this complaint upon the general ground that the District Court had no jurisdiction in the bankruptcy cause, and that therefore the adjudication thereunder was void (Transcript of Record, p. 26). The court, after hearing arguments upon said motion to dismiss, entered an order denying same (Transcript of Record, p. 29), handing down a

written opinion therein (Transcript of Record, pp. 30 to 35). Whereupon, final decree was entered enjoining the appellant from proceeding with its attachment, execution and sale (Transcript of Record, p. 36.)

CONTENTION OF APPELLANT.

No assignment of errors is set forth in the brief as required by the rules of the Circuit Court of Appeals for the Ninth Circuit (Rule 24), but it will be seen from a reading of appellant's brief and from the opinion filed in the lower court, that the ground upon which appellant relies to sustain its position that the court was without jurisdiction to adjudicate the Consumers' Lumber & Supply Company a bankrupt, is that in the involuntary petition in bankruptcy filed in said cause the only act of bankruptcy alleged has been subsequently held in a direct proceeding in another case, by the Supreme Court of the United States (*Citizens Banking Company v. Ravenna National Bank*, 234 U. S. 360; 34 Sup. Ct. Rep. 806), not to constitute an act of bankruptcy, it being the contention of appellant that in order to give a court of bankruptcy jurisdiction, the petition must not only allege the residence, domicile, and place of business of the bankrupt as within the district for the requisite time, the character of the person or corporation petitioned against, the amount of debts owing as

over one thousand dollars, and the fact that the three, or more, petitioning creditors together hold five hundred dollars or more of provable claims, but also a *valid act of bankruptcy*, and that the failure to allege in the petition any one of these facts leaves the court without jurisdiction to adjudicate.

POSITION OF RESPONDENT.

Respondent contends that the District Court had jurisdiction in the bankruptcy cause whether or not the petition alleged a valid act of bankruptcy, and having jurisdiction, even though the decision were erroneous, after adjudication, it could not collaterally be attacked.

DISCUSSION.

APPELLANT'S "POINTS AND AUTHORITIES."

It is admitted at the outset that many of the doctrines and statements of law set forth in appellant's

brief are a correct exposition of abstract principles. It is the *application* of these principles to the *case at bar* which creates the issue. All of the *general* statements of law set forth in appellant's brief under "Points and Authorities" may be admitted:

Paragraph I of said "Points and Authorities" merely quotes several sections of the bankruptcy act not in controversy.

Paragraph II thereof is a list of authorities which, insofar as relevant, will be hereafter discussed.

Paragraph III contains a general statement of law which is admitted, viz.: That an

"Adjudication, if within the jurisdiction of the court, is voidable upon direct attack, but conclusive against collateral attack; if not within the jurisdiction and the record affirmatively shows a lack of jurisdiction, it is void for all purposes."

In view of the decision of *Citizens Banking Company v. Ravenna National Bank*, 234 U. S. 360, 34 Sup. Ct. Rep. 806, the correctness of paragraph IV of said "Points and Authorities" is also admitted, viz.: that

"The petition for involuntary bankruptcy filed against the Consumers' Lumber & Supply Company and upon which adjudication was made, alleged but

one act as an act of bankruptcy and that is not an act of bankruptcy under the statute."

Paragraph V of said "Points and Authorities," to the effect that the adjudication in the instant case was null and void and is therefore subject even to collateral attack, is the question at issue.

Paragraph VI of "Points and Authorities" of appellant is freely admitted, viz.: that

"A want of jurisdiction affirmatively appearing on the face of the record cannot be cured nor a judgment rendered on such record validated by consent, appearance, ratification, or estoppel."

It may be seen, therefore, as heretofore stated, that it is merely in the application of admitted principles to the case at bar that appellant and respondent disagree.

JURISDICTION OF THE FEDERAL COURTS IN BANKRUPTCY PROCEEDINGS.

It is believed that appellant, in its brief, concedes that the federal courts in bankruptcy, although of

limited jurisdiction, in a sense, are yet courts of general jurisdiction, and that their decisions are within the general rule that where it appears that the court had jurisdiction of the subject matter and that the defendant was duly served with process or voluntarily appeared, the judgment is conclusive and not open to collateral attack. But because of appellant's vacillation, and for greater clearness, it is deemed advisable to set forth the decisions of the court upon this question.

In *Michaels v. Post*, 21 Wall. 398, 22 L. Ed. 520, 525-6, which was a suit instituted by an assignee in bankruptcy under the act of 1867 to recover property alleged to have been preferentially conveyed, the defense assigned was that the proceedings in bankruptcy were void and of no effect. Upon this question Justice Clifford, delivering the opinion of the court, said:

"But the court here is entirely of a different opinion, as the district courts are created by Act of Congress which confers and defines their jurisdiction, from which it follows that decrees rendered in pursuance of the power conferred are entitled in this court to the same force and effect as the judgments or decrees of any domestic tribunal, so long as they remain unreversed or are not annulled."

". . . .

"Power to establish uniform laws upon the subject of bankruptcy throughout the United States is conferred upon Congress, and Congress having exercised the power it has become an exclusive power. By the Act of Congress the juris-

diction to adjudge such insolvent debtors as are described in the 39th section of the act to be bankrupts is vested in the district courts, and it follows that such a judgment is entitled to the same verity, and is no more liable to be impeached collaterally than any other judgments or decrees rendered by courts possessing general jurisdiction, which of itself shows that the case before the court is controlled by the general rule that where it appears that the court had jurisdiction of the subject matter, and that the defendant was duly served with process or voluntarily appeared and made defense, the judgment is conclusive and is not open to any inquiry upon the merits."

"Exactly the same rule is applicable to the case before the court, as it is clear that the District Court had jurisdiction of the petition and that there is not even a suggestion that the notice required by law was not given as the law directs."

"Such a decree adjudging a debtor to be bankrupt is in the nature of a decree *in rem* as respects the *status* of the party, and in case the court rendered it has jurisdiction it is only assailable by a direct proceeding in a competent court, if due notice was given and the adjudication is correct in form."

And the Supreme Court of the United States specifically has reaffirmed this proposition in the following cases:

Sloan v. Lewis, 22 Wall. 150; 22 L. Ed. 832-3.

New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656; 23 L. Ed. 336, 338-9.

Chapman v. Brewer, 114 U. S. 169; 29 L. Ed. 83, 87.

Graham v. Boston, Hartford & Erie R. R. Co., 118 U. S. 161; 30 L. Ed. 196, 204-5

And the same doctrine has been announced by state and federal courts in the following cases:

Roche v. Fox (*W. Dist. Wis.*), Fed. Case 11974; 20 Fed. Cas. 1065, 1066 (first column.)

Allen & Co. v. Thompson (*D. C. W. Dist. Tenn.*), 10 Fed. 116, 120-2.

Mount v. The Manhattan Co. (*N. J.*), 3 Atl. 726, 728-9.

In re: Mason (*D. C. W. Dist. N. C.*), 99 Fed. 256, 257.

In re: Columbia Real Estate Co. (*D. C. Ind.*), 101 Fed. 965, 970-1; 4 Am. B. R. 411.

Edelstein v. United States (*C. C. A. 8th Cir.*), 149 Fed. 636, 638-9; 9 L. R. A. (*N. S.*) 236, 239.

Gilbertson v. United States (*C. C. A. 7th Cir.*), 168 Fed. 672, 674.

In re: First National Bank of Belle Fourche (*C. C. A. 8th Cir.*), 152 Fed. 64; 18 Am. B. R. 265, 271-3.

In re: Marion Contract & Construction Co. (*D. C. W. Dist. Ky.*), 166 Fed. 618, 620.

And to the same effect are all of the text writers upon bankruptcy.

Black on Bankruptcy, Sec. 61, p. 41.

Collier on Bankruptcy, pp. 23, 24.

Loveland on Bankruptcy, Sec. 244, pp. 502-506.

Remington on Bankruptcy, Sec. 29, p. 46.

It therefore may be premised as incontrovertible that *the adjudication by a district court in bankruptcy, upon questions of bankruptcy are to be governed by the same rules concerning jurisdiction as govern courts of general jurisdiction.*

JURISDICTION OF COURTS OF GENERAL JURISDICTION.

The best definition of jurisdiction and the clearest exposition of its connotations, it is believed, is that of the New Jersey Supreme Court, occurring in the case of *Munday v. Vail*, 34 N. J. Law, 418. The court said:

"Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in the given case. To constitute this there are three essentials. First, the court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. And third, the point decided must be, in substance and

effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A. and B. are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over those particular interests which they choose to draw in question that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the court of chancery should decree a divorce between them, it would require no argument to convince everyone that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstance that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere ar-

bitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concluded a point upon which the parties have not been heard. And it is upon this very ground, that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels."

This quotation was adopted by so final an authority as the Supreme Court of the United States, Mr. Justice Brewer delivering the opinion of the court, in the case of *Reynolds v. Stockton*, 140 U. S. 254, 268, 35 L. Ed. 464, 468-9. It is also approved by Judge Ray in the decision of *In re: Casey* (D. C. N. Y.), 195 Fed. 322, 327-8, and by so authoritative a text writer as *Black on Judgments* (2d Ed.), Section 242, p. 358. Justice Brewer, Judge Ray, and Mr. Black, quote at length from the opinion.

From this exposition it will be seen that if the court has cognizance of the class of cases to which the one to be adjudged belongs, and the proper parties are before it, and the point decided is within the issue, then jurisdiction attaches, and the judgment or adjudication, *however erroneous*, cannot be attacked collaterally.

It is assumed that there will be general acquiescence by counsel for appellant in the principles of law thus far stated, and since there is no dispute concerning juris-

diction of the parties, we may, therefore, proceed with the discussion of jurisdiction of the subject matter.

JURISDICTION OF THE SUBJECT MATTER.

As pointed out in the discussion of the question of jurisdiction generally, three elements are requisite:

1. The proper *parties* must be before the court.
2. The court must have cognizance of the *class of cases* to which the one to be decided belongs.
3. The *point* decided must be *within the issue*.

The courts usually, in discussing the question of jurisdiction, consolidate the elements 2 and 3 and refer to the same as the power to pass upon the subject matter. So it may be said that *courts have jurisdiction of the subject matter when they have cognizance of the class of cases to which the one to be decided belongs, provided the point to be decided is within the issue raised.*

Cognizance of bankruptcy cases is conferred upon the district courts by Congress under what is generally known as the "Bankruptcy Act," and as we have seen these courts, as to their jurisdiction in bankruptcy, are governed by the same rule as is applied to courts of general jurisdiction, so when a decision is rendered by a bankruptcy court, either adjudicating or refusing

to adjudicate an individual, firm, or corporation, bankrupt, that decision is *within the issue*, therefore, it must follow that an adjudication in bankruptcy of a person or corporation amenable to bankruptcy properly before the court *cannot be questioned collaterally*.

It has been stated by various text writers, and in numerous cases, *obiter dicta* (though no case has been found in which a decision was directly rendered in that regard), that where it is neither alleged nor shown that a person or corporation against whom a petition is filed, was included in the class amenable to the provisions of the bankruptcy act, the court would have no jurisdiction to adjudicate. For example, if it be not alleged or shown that a corporation under the present act is a moneyed, business, or commercial corporation, and not a municipal, railway, insurance, or banking corporation, or if it be not alleged or shown that the person or corporation petitioned against has had its residence, domicile, or place of business within the district, for the greater portion of six months next preceding the filing of the petition, it has been stated, *obiter dicta* by some courts, although not expressly so held, that the court would have no jurisdiction thereof, and that such want of jurisdiction could be taken advantage of in a collateral proceeding, even by one who had participated in the proceedings and benefited thereby. While this position may or may not be a correct view of the question, it has been expressly denied in several cases, the two most prominent of which are *In re: Broadway Savings Trust Co.* (C. C. A. 8th Cir.), 152 Fed. 152, and *In re First National Bank of Belle Fourche* (C. C. A. 8th

Cir.), 152 Fed. 64. If, however, the dicta expressed by the former cases be correct, the reason therefor unquestionably is that the point decided was not within the issue because the Bankruptcy Act specifically eliminates from its provisions such corporations or persons, and the court has no more authority to adjudicate them bankrupts than it would have in an admiralty case, for example, to adjudicate a lien upon a residence situated upon land which possibly might adjoin a body of water.

Now, applying the principles thus far promulgated to the case at bar, the corporation adjudged bankrupt was alleged to be, and was, a corporation subject to involuntary bankruptcy; the parties were properly before the court and consequently jurisdiction existed in the District Court for the District of Oregon to adjudicate it bankrupt. Having done so, the adjudication cannot be contested collaterally, although the court may have erroneously determined that a cause of action was properly stated in the petition and in fact existed, since the court had cognizance of the question to be decided and the decision rendered was within the issue, viz.: whether the corporation, amenable to the Bankruptcy Act, should be adjudicated a bankrupt.

The fallacy running through the entire brief of appellant which forms the basis for its conclusion that the court was without jurisdiction in making the adjudication, arises from its assumption that by reason of the failure properly to state a cause of action in the petition, the court obtained no jurisdiction of the subject matter. *It is not a prerequisite to jurisdiction that*

pleadings should state a cause of action, but merely that the point to be decided should be within the issue. This is evidently the view of so respectable an authority as Remington, who, in his work on *Bankruptcy*, at page 50, in discussing the decisions of *In re: Broadway Savings Trust Co.*, 152 Fed. 152, and *In re: First National Bank of Belle Fourche*, 152 Fed. 64, heretofore mentioned, referring to the holding that the lack of the allegations, in the involuntary petition, that a corporation was engaged principally in manufacturing, trading, etc., did not defeat the jurisdiction of the court, says:

“However, it would seem that did they (the allegations) pertain simply to the *cause of action*, their non-existence would be waivable.”

The phrase “cause of action” mentioned by Remington, of course, could mean nothing but the act of bankruptcy, since that is the only cause of action properly set forth in a bankruptcy petition.

In the case of *In re: First National Bank of Belle Fourche* (C. C. A. 8th Cir.), 152 Fed. 64, 68; 18 Am. B. R. 265, 271-3, it is said:

“Jurisdiction of the subject matter and of the parties is the right to hear and determine the suit or proceeding in favor of or against the respective parties to it.

The facts essential to invoke this jurisdiction differ materially from those essential to constitute a good cause of action for the relief sought. A defective petition in bankruptcy, or an insufficient complaint at law, accompanied by proper service of process upon the defendants, gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments which entitle the complainant to any relief; and it may be the duty of the court to determine either the question of its jurisdiction or the merits of the controversy against the petitioner or plaintiff. Facts indispensable to a favorable adjudication or decree include all those requisite to state a good cause of action, and they comprehend many that are not essential to the jurisdiction of the suit or proceeding.

. . . The jurisdiction of a court is not limited to the power to render correct decisions. It is the power to decide the issues according to its view of the law and the evidence, and its wrong decisions are as conclusive as its right ones. It empowers the court to determine every issue within the scope of its authority, whether its decision is right or wrong, and every judgment or decision so rendered is final and conclusive upon the parties, unless reversed by writ of error or appeal or vacated by some direct proceeding."

Practically the same language was used by the same court in the case of *In re: Plymouth Cordage Co.*, 135 Fed. 1000, 1004.

In *Roche v. Fox (W. Dist. Wis.)*, Fed. Case 11974, 20 Fed. Cas. 1065, 1066 (first column), the court in discussing this phase of the question, makes the following pertinent comments:

"It is claimed that the court has not jurisdiction. Jurisdiction of what? The law gives the court jurisdiction of the subject matter before any petition is filed. And the filing of the petition, the service of process, and the appearance of the alleged bankrupt in the cause, are ample to give jurisdiction of the person. What question of jurisdiction remains? In a certain sense it is true the court has not jurisdiction. It cannot proceed to furnish the relief prayed for upon a petition which is demurrable in not containing all the necessary allegations. And the true force of the objections, to my mind, does not go to the jurisdiction of the court, but only to the sufficiency of the petition as a pleading. The petition in bankruptcy answers to the declaration or complaint in an action at common law, or bill of complaint in equity. Its office is to set forth the cause of action. It was never yet held that a complaint in an action at law or suit in equity should be dismissed for want of jurisdiction in the court, when suit has been commenced by service of process, and an attempt made to set out a cause of action, but the complaint is defective in some particulars in not containing all the essential allegations to make a good case. Such defect would be good ground for demurrer, which, if sustained, leave would be given to amend, which, of course,

could not be done if the court had not jurisdiction. It must in such case dismiss the proceeding."

The Circuit Court of Appeals for the Eighth Circuit, in *Edelstein v. United States*, 149 Fed. 636, 638-9; 9 L. R. A. (N. S.) 236, 239, said:

"The petition of the creditors was in approved form, except that it failed to aver that the bankrupts were not wage-earners or persons engaged chiefly in farming or the tillage of the soil, as required by section 4 of the Bankruptcy Act as amended. For want of such averment, the petition was demurrable, and if timely objection had been made to it no adjudication could have been had upon it. *C. C. Taft Co. v. Century Savings Bank*, 72 C. C. A. 671, 141 Fed. 369; *In re: Plymouth Cordage Co.*, 68 C. C. A. 434, 135 Fed. 1000; *Beach v. Macon Grocery Co.*, 57 C. C. A. 150, 120 Fed. 736; *In re: Taylor*, 42 C. C. A. 1, 102 Fed. 728. But after a hearing was had, an adjudication of bankruptcy made, and the bankrupt, recognizing its validity, had applied for a discharge from his debts, can it be said that such an adjudication, when no person interested has questioned its validity by appeal or otherwise, is void upon collateral attack? We think not. It is true the District Court as a court of bankruptcy is one of limited jurisdiction—that is, limited in respect of the subjects over which it may exercise jurisdiction—but it is unlimited in respect of its power over

proceedings in bankruptcy, specifically made subject to its jurisdiction by section 2 of the act. When judgments are rendered by that court upon questions arising in such proceedings, they possess all the incidents and qualities of finality and conclusiveness appertaining to judgments of courts of general jurisdiction. Its judgments, unless reversed on appeal or writ of error, import absolute verity. . . . In view of the principles so announced, it must be held that it was the duty of the court of bankruptcy primarily to find the facts, and determine therefrom, as a matter of law, whether it had jurisdiction over the proceeding before it. It performed its duty, reached the conclusion that it had, and pronounced judgment accordingly. Neither the bankrupts nor any other interested party saw fit to challenge the judgment by appeal or otherwise. It therefore became final and conclusive, and is not subject to collateral attack, as attempted in this case."

And to the same effect are the cases of:

In re: Brett (D. C. N. J.), 130 Fed. 981-2, 12 Am. B. R. 492, 493-5.

In re: Broadway Savings Trust Co. (C. C. A. 8th Cir.), 152 Fed. 152, 153, 18 Am. B. R. 254.

And Black in his work on *Judgments* (Second Edition), in a note to Section 248, p. 370, after quoting numerous cases, says:

"As to questioning the jurisdiction of the court, this cannot be done, if the objection to the jurisdiction concerns the character or number of creditors joining in the petition, *the sufficient allegation of an act of bankruptcy*, or the amount of debts owed by the bankrupt. But there are authorities to the effect that a total want of jurisdiction over the person of the bankrupt may be shown, even collaterally." (Italics ours.)

JURISDICTION—AUTHORITIES CITED BY APPELLANT.

Appellant on p. 11 of his brief quotes from *Loveland on Bankruptcy*, Sec. 191, to the effect that three things must concur in order to justify the institution of involuntary proceedings in bankruptcy: First, the debtor must be of a class amenable to involuntary bankruptcy; second, that he must owe debts to the amount of one thousand dollars or over; and third, that he must have committed an act of bankruptcy within four months of the filing of the petition; and that these three elements are jurisdictional, "and must all exist in order to give the court power to adjudicate the debtor a bankrupt. If any of these three things does not exist the proceeding fails."

From a reading of the entire section, which is part of a chapter discussing "*Parties, and the Petition in In-*

voluntary Bankruptcy," it is clear that Loveland is speaking loosely when he uses the word "jurisdiction" and is not using it in the sense that a judgment rendered by the court could be attacked collaterally were one of these elements lacking. The case cited by Loveland to show that an act of bankruptcy must exist in order to give the court jurisdiction is *In re: Empire Metallic Bedstead Company*, 98 Fed. 981, 3 Am. B. R. 575, which case holds merely that where the act stated in the petition is not an act of bankruptcy and an answer is filed denying that the act was an act of bankruptcy, the petition, after hearing, should be dismissed! And in none of the cases cited under this section as to the other so-called "jurisdictional" elements was the question of the jurisdiction of the court involved collaterally, and in all of them the decision was *upon demurrer or answer in the original proceeding*. So it is clear that Loveland was not using the word "jurisdictional" in its strict or even proper sense in the section quoted by appellant, and the quotation used is not even relevant to this discussion.

Appellant further insists that jurisdiction conferred by the bankruptcy act can operate only when invoked by a proper pleading. Of course, it is conceded that the jurisdiction latent in the bankruptcy court cannot be rendered active until a petition is filed, but it is maintained that when a petition is filed against a person or corporation amenable to the bankruptcy act, then whether the allegations of the petition be demurrable or not, or whether a cause of action be properly stated therein or not, the jurisdiction of the court is awakened

and every activity of the court in the cause resulting in a decision, correct or erroneous, unless taken advantage of by appeal or review or motion to vacate, or other direct proceeding, is forever binding and cannot be collaterally assailed. This question has been settled by many cases, e. g.:

- Roche v. Fox, Fed. Case 11974, 20 Fed. Cas. 1065, 1066 (first column.)*
Allen & Co. v. Thompson, 10 Fed. 116, 120.
In re: Columbia Real Estate Co. (D. C. Ind.), 101 Fed. 965, 970.
In re: Brett (D. C. N. J.), 130 Fed. 981.
In re: First National Bank of Belle Fourche (C. C. A. 8th Cir.), 152 Fed. 64; 18 Am. B. R. 265, 271,

and need not be further discussed here.

Appellant, upon the question of jurisdiction, on pages 14 to 17 of its brief, cites and quotes *Griffith v. Frazier, 8 Cranch, 9*; *In re: Sawyer, 124 U. S. 200*; and *Rich v. Mentz Township, 134 U. S. 632*, and then concludes as follows:

“We submit, therefore, that the jurisdiction of United States District Courts, sitting as Courts of Bankruptcy, is conferred, defined and limited by the statute, but before a judgment or adjudication can be entered, which will have any effect and be other than a mere nullity, a petition must be filed specifically alleging the commission of an act of bankruptcy.”

The three cases cited by appellant have no relation whatsoever to the question of bankruptcy, and the deduction which is drawn from these decisions by appellant is clearly *a non sequitur*.

In the case of *In re: New York Tunnel Co.*, 166 Fed. 284, cited by appellant on page 21 of its brief, it was held that the court *had jurisdiction* and the petition to review was dismissed, and the language quoted by appellant is mere dicta, with which, however, there is no occasion to dissent since it does not affect the question involved in this case.

In the case of *Elmyra Steel Co.*, 5 Am. B. R. 484, 109 Fed. 456, opinion by Referee Munn, which opinion was adopted by the District Judge, there was a contest as to which of two district courts had jurisdiction of the bankruptcy proceedings. The petition which was filed in one of the courts, viz: that of the Eastern District of Pennsylvania, contained no allegation whatsoever as to the character of the corporation against which it was directed, and the referee held that the lack of averment and proof of the character of the corporation in the petition gave the court no jurisdiction to adjudicate. While this decision has been *criticised and questioned* by the Circuit Court of Appeals for the Eighth Circuit in the case of *In re: First National Bank of Belle Fourche*, 152 Fed. 64, at page 70, it is not seen how the question decided affects the case at bar, wherein the

only question is whether failure properly to allege a *cause of action*, viz: a defective allegation of an act of bankruptcy, deprived the court of all jurisdiction whatsoever over the question at issue.

The pertinency of *In re: Stein*, 130 Fed. 377, (*Eastern District of Pennsylvania*), cited and quoted by appellant at page 24 of its brief, is also not seen. There the District Court for the Eastern District of Pennsylvania held that where the petition showed that the aggregate of the three petitioning creditors' claims was less than five hundred dollars, the court did not have jurisdiction to entertain the same, and upon demurrer the petition was dismissed and an amendment refused. (Even this decision, however, had been criticized by the Circuit Court of Appeals for the Eighth Circuit in the case of *In re: Plymouth Cordage Co.*, 135 Fed. 1000, 1005.)

The case of *Murray v. American Surety Co. of New York*, 70 Fed. 341, cited and quoted by appellant, was a case wherein suit was instituted to recover upon two surety bonds given by a receiver, the receiver having been appointed by the State Court in a statutory proceeding, which gave the court no authority to appoint a receiver, and the court held merely that in a statutory proceeding of that kind the court exceeded its jurisdiction when it appointed a receiver, and therefore it had no jurisdiction so to do; in other words, this case

is again an illustration of a court attempting to do something which was *without* the issue, viz: to appoint a receiver, whereas its only authority under said statute was to direct the bank commissioners to take such proceeding against the bank as should be decided upon by its creditors.

The doctrine of *Settlemeier v. Sullivan*, 97 U. S. 444, 449, and of *Galpin v. Page*, 18 Wall, 366, cited by appellant, is that where the record states the evidence or makes an averment with respect to a jurisdictional fact, it will be taken to speak the whole truth and no presumption will be allowed that different evidence was produced, or that the fact was otherwise than averred. This does not in any manner, however, warrant the inference which appellant draws and seeks to apply to the case at bar, that the proper allegation of a valid act of bankruptcy is jurisdictional.

The appellant, it seems, cannot surrender entirely the view maintained by it in the lower court, that courts of bankruptcy are courts of limited jurisdiction, and this apparently is the reason for the quotation from the *Encyclopedia of United States Supreme Court Reports* appearing on pages 23 and 24 of its brief. This question has already been adverted to at some length. However, it is not deemed amiss to quote at length from a strikingly apposite decision of District Judge Hammond of the District Court of the Western District of

Tennessee, in the case of *Allen & Co. v. Thompson*, 10 Fed. 116, 120-2, which has already been quoted in connection with numerous decisions of the Supreme Court of the United States and of numerous district and state courts. Says Judge Hammond:

"It is sometimes, indeed very often, said loosely that it is never too late to take objection to the jurisdiction of a federal court, and there is not wanting a kind of judicial sanction for the notion that in determining questions of jurisdiction in these courts a more strict rule is to be applied than to other courts, and that they must be treated with that degree of scrutiny that is applied to jurisdiction obtained by extraordinary process, or to that belonging to courts of extraordinary powers. I dissent entirely from this view, and while we are constrained by authority in that class of cases where jealousy of these courts has resulted in very strict construction of their jurisdiction, and the mode of obtaining it, the principle does not at all apply in bankruptcy, admiralty, and other proceedings of which they have exclusive cognizance, so far as pertains to jurisdiction over the persons or *res* involved in the litigation.

Entire want of jurisdiction over the subject-matter may be taken advantage of at any time, and it is never too late to make the objection; and it may be even collaterally attacked. Freeman, Judgments, Sec. 120; Id. Sec. 117 *et seq.* But where the objection goes merely to a want of jurisdiction of the person or the thing, there may be a waiver of the objection

or restrictions as to the time and manner of making it; the judgment becomes not void, but only voidable, and presumptions are indulged in favor of the jurisdiction, unless it be made to appear by direct proceedings that there was a want of it. *Id.* Sec. 124. It is not necessary to go into the technical complications of this subject here, but only to advert to the distinction, that we may have it in mind in considering this case. . . . To my mind the proposition that they (creditors) may come in, prove their debts, choose an assignee, distribute the estate, and take all the benefit of the proceeding they can have, and then when the debtor applies for a discharge object that the court has no jurisdiction to grant it, is intolerable. Why should they not, when notified of the proceeding, in analogy to other cases, make objection to the jurisdiction in the beginning?

And why, if they prove their debts without taking this objection, should they not be considered to have waived it? If it be conceded that, in cases at law or equity, where the record shows a want of jurisdiction on its face the objection may be taken at any time; on the other hand, if it show jurisdiction on the face the showing is conclusive, unless there be an objection taken by plea in abatement or otherwise *in limine*. But I am unwilling, for my part, to extend any principle that would permit a proceeding to be vacated for want of jurisdiction, because the jurisdictional facts do not appear on the face of the pleading to these petitions in bankruptcy. We have entire jurisdiction of the subject-matter, and may acquire jurisdiction of the persons and the *res* under

given conditions; and it does not seem that there should be a presumption in favor of the existence of the conditions and the jurisdiction, unless parties notified at once and in the beginning point out the defects or non-existence of the jurisdictional facts by motion or petition to vacate the adjudication for want of jurisdiction. . . .

I do not, therefore, deem it important to inquire whether the original petition, on its face, gives jurisdiction or not, though I think it defectively states enough on which to predicate jurisdiction, or whether this petition to annul the discharge states enough to show a want of jurisdiction; for, whether the original petition is defective or not, or whether the facts it states are untrue or not, I hold that this creditor having been notified, or having appeared and filed his proof of debt without in any form taking objection to the jurisdiction, has waived that objection, and he cannot now make it at all."

Appellant takes exception to that portion of the opinion of District Judge Wolverton which suggests that the petition might have been amended so as to state a good cause of action, and therefore its adjudication must be held final until vacated by direct attack, especially as the bankrupt itself had admitted insolvency, and prayed for the adjudication. Upon this subject appellant quotes at length from the case of *In re: Louisell Lumber Company*, 209 Fed. 785. In that case there was an involuntary petition filed in the District Court which *did not state or attempt to state any act of bankruptcy*. The petition was filed within

four months of the levying of an attachment by Armour & Company. About eight months after the levying of the attachment, no adjudication having been made, and more than four months after the filing of the original petition, an amended petition was filed, whereupon the court adjudged the Louisell Lumber Company bankrupt and dissolved the Armour & Company lien. Armour & Company thereupon filed a petition for revision of the order dissolving the lien, setting forth the foregoing facts, and asserted a prior lien under the attachments and levies, its contention being that the amendment to the original petition should not relate back to the date of the filing of the original petition so as to bring the proceedings within four months from the date of the levy of the attachment. The court held that the amendment would be allowed but would not relate back where to do so "would have the effect of depriving an adverse party of a substantial right *on which no attack was made in the original pleading.*" However, this is not the situation in the case at bar, since an attack was clearly made upon the attachment of the appellant in the involuntary petition filed, and as appears from the record appellant had his day in court upon the same, and had his opportunity to appeal from the order of the court deciding adversely to his contention. We shall discuss this phase more particularly hereinafter, under the topic "Estoppel."

JURISDICTION — NON-EXISTENCE MUST AFFIRMATIVELY APPEAR ON COLLATERAL ATTACK.

Respondent's position, as already discussed, is that the failure properly to allege a valid act of bankruptcy is not a jurisdictional question, and therefore the court had jurisdiction in fact. Again, it should be noted, (eliminating for the purpose of this phase of the discussion the fact that the validity of the allegation as to the act of bankruptcy is not jurisdictional), that the record itself does not show that the court did *not* have jurisdiction, and it has frequently been held that although the record fails to show jurisdiction, notwithstanding said failure, it will be presumed that the court had jurisdiction, and it is only where the record affirmatively shows that the court did *not* have jurisdiction that in a *collateral* proceeding the jurisdiction can be attacked. In fact, appellant itself quotes with approval, on page 27 of its brief, the following language from Loveland:

“If the record shows a lack of jurisdiction, the adjudication is null and void and may be assailed in a collateral proceeding. In order to render an adjudication void, the *absence* of jurisdiction must *affirmatively* appear on the record.”
(Italics ours.)

To the same effect see:

- Loveland on Bankruptcy*, Sec. 244, p. 503.
Remington on Bankruptcy, Sec. 437, p. 279, 280.
Black on Bankruptcy, Sec. 182, p. 479.
In re: Urban & Suburban Realty Title Co., 132 Fed. 140, 141; 12 Am. B. R. 687.
Allen & Co. v. Thompson (D. C. West. Dist. Tenn.), 10 Fed. 116, 120-2.
In re: Columbia Real Estate Co. (D. C. Ind.), 101 Fed. 965, 970-1.
In re: First National Bank of Belle Fourche, 18 Am. B. R. 271; 152 Fed. 64.
Edelstein v. United States (C. C. A. 8th Cir.), 149 Fed. 636, 368-9, and
Dowell v. Applegate, 152 U. S. 327, 340,

where it is observed by Justice Harlan, after reviewing the authorities:

"These cases establish the doctrine that, although the presumption in every stage of a cause in a circuit court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, yet . . . if such jurisdiction *does not* so appear, the judgment or final decree cannot, for that reason, be collaterally attached, or treated as a nullity."

The involuntary petition in bankruptcy in the case at bar certainly does not affirmatively show that the court has *no* jurisdiction. It sets forth that the alleged bankrupt had for the greater portion of six months

next preceding the date of the filing of the petition in bankruptcy had its principal place of business in the district; that it owed debts in the amount of more than one thousand dollars; that it was a moneyed, business, or commercial corporation; that the four petitioning creditors had provable claims in excess of five hundred dollars; that the alleged bankrupt was insolvent; and that

"within four months next preceding the date of this petition, the said Consumers' Lumber & Supply Company committed an act of bankruptcy, in that it allowed Larkin-Green Logging Company to levy an attachment on all of the assets and property of said Consumers' Lumber & Supply Company, which attachment has never been released or discharged or vacated, and which attachment was levied on December 18, 1912, and will become a prior lien and cannot be removed or set aside or dissolved through bankruptcy proceeding, after April 18, 1913." (The petition was filed on the 17th day of April, 1913.) "That said Consumers' Lumber & Supply Company has done nothing to vacate or set aside said attachment and has not gone into bankruptcy voluntarily and its failure to do so will thereby create a preference in favor of said Larkin-Green Logging Company, by reason of the attachment levied by said Larkin-Green Logging Company on said December eighteenth, 1912; said attachment is still a lien on all the assets of said debtors.

That unless said Consumers' Lumber & Supply Company is adjudicated a bankrupt and unless this petition is filed forth-

with, a preference will be gained and obtained by said Larkin-Green Logging Company as well as by Linnton Savings Bank, which levied a writ of attachment and attached all of the assets of said Consumers' Lumber & Supply Company on December 26th, 1912, and therefore on April 26th, 1913, said Linnton Savings Bank will also obtain a preference, as said Consumers' Lumber & Supply Company has done nothing to set aside said attachment, nor has it filed a voluntary petition in bankruptcy.

That the said obligations owing to said Larkin-Green Logging Company and Linnton Savings Bank are for prior indebtedness which was owing to the said attaching creditors prior to said December 18th, 1912.

That by reason of the foregoing facts said Consumers' Lumber & Supply Company has permitted and suffered a preference in favor of said Larkin-Green Logging Company and Linnton Savings Bank which can only be set aside through an adjudication in bankruptcy, of said Consumers' Lumber & Supply Company."

So that even assuming for the moment that the proper allegations of valid acts of bankruptcy are matters which go to the jurisdiction of the court, which assumption, however, is made only *arguendo*, it is submitted that a reading of the allegation of the acts of bankruptcy in the petition, as set forth above, does not affirmatively show that the debtor had not suffered or

permitted, while insolvent, a creditor to obtain a preference through legal proceedings, and not having at least five days before the sale or final disposition of the property affected by such preference vacated or discharged such preference, as interpreted by the late decision of the United States Supreme Court in the case of *Citizens Banking Company v. Revenna National Bank*, 234 U. S. 360, 34 Sup. Ct. Rep. 806.

Therefore, even if appellant's contention that valid acts of bankruptcy must be properly set forth in the petition in bankruptcy in order to create jurisdiction in the court be correct, it is maintained that the act of bankruptcy as attempted to be set forth in the petition, although faulty upon demurrer, as set forth, does not show affirmatively that no act of bankruptcy had been committed.

JURISDICTION—CONCLUSION.

Bankruptcy causes in United States courts have been numerous, and have had able and weighty attention by the courts. Numerous cases have been cited herein, wherein it was held that allegations as to the character of the corporation amenable to the Bankruptcy Act; as to the amount of claims held by petitioning creditors; and even allegation as to the question of residence of the bankrupt, have been held *non-juris-*

dictional upon collateral attack. On the other hand, it has *never* been held, nor even stated *obiter dicta* by any court, so far as careful research could show, (and certainly counsel for appellant has not cited any case or authorities to that effect), that the failure to allege a valid act of bankruptcy in an involuntary petition, where the court had rendered an adjudication under such petition, is void *upon collateral attack*, for the reason that the court had no jurisdiction.

Remington, Black, Loveland, and Collier, the four authors and text-book writers upon the subject of bankruptcy, in their voluminous discussion of questions of bankruptcy, have nowhere stated that such a failure to allege a valid act of bankruptcy was a matter of jurisdiction which could be taken advantage of collaterally, and Black, in his work on Judgments, has specifically stated otherwise. (It is true, in a quotation of Loveland heretofore explained, cited by appellant, Loveland loosely uses the word "jurisdiction" in this connection, but from the explanation already made, it is clearly seen that he was not speaking of jurisdiction in its strict and proper sense.)

It is earnestly insisted that the reason why no such case has been found is that the position of appellant is not law.

ESTOPPEL.

The District Court, Judge Wolverton delivering the opinion, further held that the Larkin-Green Logging Company having, after the overruling of its demurrer to the involuntary petition in bankruptcy and the adjudication, proved its claim as an unsecured creditor, and upon the strength thereof voted for a trustee and participated in the subsequent proceedings, cannot now be heard to question the jurisdiction of the court to make the adjudication, citing:

In re: Hintze, 134 Fed. 141.

In re: Worsham, 142 Fed. 121.

In re: New York Tunnel Co., 166 Fed. 284.

Said Circuit Judge Hook, in the Worsham case:

"When a bankrupt and all of his creditors have recognized the validity and regularity of proceedings in a court of bankruptcy, have participated therein, and sought the benefit thereof, one of such creditors will not be heard long after the adjudication to object to the jurisdiction of the court upon the ground that the proceedings were instituted in a district in which the bankrupt did not reside or

have his domicile or principal place of business for the greater portion of the preceding six months; nor upon the ground that a subpoena to the bankrupt was not issued, he having voluntarily waived the same and entered his appearance; nor upon the ground that the petition failed to allege that the bankrupt was not a wage earner or a person engaged chiefly in farming or the tillage of the soil. And, for like reasons, he will not be permitted to otherwise contest the petition upon which the adjudication proceeded."

And Judge Hammond, in the case of *Allen & Co. v. Thompson*, 10 Fed. 116, 120-2, (already quoted in another connection) said:

"To my mind the proposition that they (creditors) may come in, prove their debts, choose an assignee, distribute the estate, and take all the benefit of the proceedings they can have, and then when the debtor applies for a discharge object that the court has no jurisdiction to grant it, is intolerable. Why should they not, when notified of the proceeding, in analogy to other cases, make objection to the jurisdiction in the beginning? And why, if they prove their debts without taking this objection, should they not be considered to have waived it."

To the same effect see:

In re: Mason (D. C. N. C.), 99 Fed. 256, 257.
Loveland on Bankruptcy, Sec. 245, p. 507.
Black on Bankruptcy, Sec. 182, p. 459.

Appellant devotes much time and energy to the proposition that parties cannot by consent confer jurisdiction on courts, and from this principle, with which we have no quarrel, deduces that appellant cannot be held to have waived or be estopped from attacking the adjudication collaterally.

The error into which the appellant falls in that regard, is two-fold: In the first place, as we believe, as hereinbefore shown, appellant is wrong in its view as to what is jurisdictional in such a proceeding. Aside from that consideration, however, it is wrong because, even assuming, *arguendo*, that the allegation of a valid act of bankruptcy is jurisdictional, its consent would in no wise be claimed to confer the jurisdiction for the adjudication. The appellant is not the bankrupt. The bankrupt could undoubtedly confer jurisdiction by answering, and concurring in the prayer that it be adjudicated a bankrupt. It is, therefore, plainly apparent that conceding everything that appellant claims, the adjudication was unquestionably proper. The appellant was merely a creditor with a claim against the bankrupt, and when it proved its claim it did not, even under its own theory, confer jurisdiction; it merely acquiesced in the course taken by the bankrupt, and waived, *not jurisdiction*, but its right to object to the relating back of the adjudication so as to affect its attachment lien.

Surely there can be no question of the right of a lien creditor to waive its lien and participate as an unsecured creditor. This is what appellant did, and it cannot now be heard after the lapse of a year and a half, and the incurring of heavy expenses incident to the administration of the estate, to change its position so as to deplete the estate of all of its assets. The proof of its claim as an unsecured claim and the waiving of its lien marks the clear distinction between the position of this appellant and that of Armour & Company, in the case of *In re: Louisell Lumber Company*, 209 Fed. 785, on which appellant relies in its attempted answer to Judge Wolverton's reference to the fact that had appellant's demurrer been sustained on revision the petition might have been amended with regard to the allegation of an act of bankruptcy.

SUMMARY.

I. THE NON-JURISDICTION WHICH RENDERS AN ADJUDICATION SUBJECT TO COLLATERAL ATTACK, IF ANY, IS CONFINED TO THE PARTIES AND THE SUBJECT MATTER AND CANNOT BE SAID TO EXIST WITH REFERENCE TO THE METHOD OF STATING THE CAUSE OF ACTION, WHERE THE PARTIES AND SUBJECT MATTER ARE BEFORE A COURT OF GENERAL JURISDICTION—FOR EXAMPLE, A DISTRICT COURT SITTING IN BANKRUPTCY.

II. THE LACK OF JURISDICTION MUST AFFIRMATIVELY APPEAR IN THE RECORD AND NOT INFERENTIALLY, THE INFERENCE AND PRESUMPTIONS BEING IN FAVOR OF JURISDICTION.

III. IN ANY EVENT THE QUESTION OF JURISDICTION IS NOT PRIMARILY INVOLVED, THE BANKRUPT HAVING ANSWERED, AND THE ADJUDICATION HAVING BEEN MADE UPON THE PETITION OF CREDITORS AND UPON THE ANSWER OF THE ALLEGED BANKRUPT WHICH ADMITTED THE ALLEGATIONS OF THE PETITION AND PRAYED TO BE ADJUDGED A BANKRUPT. THE APPELLANT DID NOT THEREFORE CONFER JURISDICTION, BUT MERELY SUBSEQUENTLY WAIVED ITS LIEN AND PARTICIPATED IN THE PROCEEDINGS AS AN UNSECURED CREDITOR, AND IS NOW ESTOPPED FROM ASSERTING ITS LIEN.

It is therefore urged that the decision of the District Court should in all respects be affirmed.

Respectfully submitted,

BEACH, SIMON & NELSON, and
SIDNEY TEISER,
Attorneys for Respondent.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,
Appellants,
vs.
E. THOMPSON,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

Filed

JAN 23 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,
Appellants,
vs.
E. THOMPSON,
Appellee.

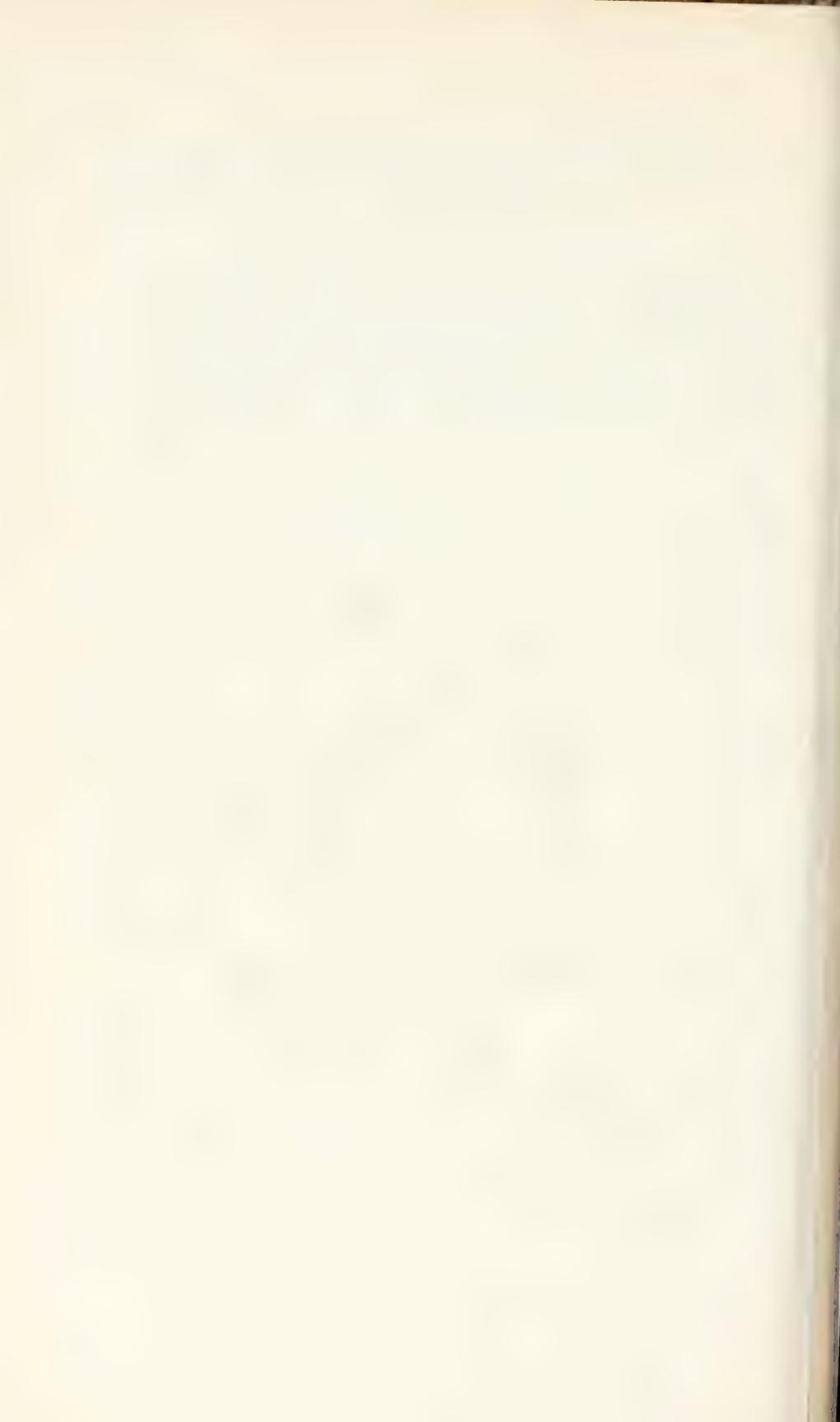
Transcript of Record.

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the Southern District of California,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

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JOS. K. HUTCHINSON, Esq., 923 First National Bank Building, San Francisco, California; and

CHAS. W. SLACK, Esq., 923 First National Bank Building, San Francisco, California.

For Appellee:

H. L. CLAYBERG, Esq., 937 Pacific Building, San Francisco, California.

MESSRS. CLAYBERG & WHITMORE, 937 Pacific Building, San Francisco, California; and

R. P. HENSHALL, Esq., Los Angeles, California. [3*]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to E. Thompson,
Greeting.

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern District of California, Southern Division, wherein Thomas W. Pack, Stella Schuler and Joseph K.

*Page-number appearing at foot of page of original certified Record.

Hutchinson are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Benjamin F. Bledsoe, United States District Judge for the Southern District of California, this 25th day of December, A. D. 1914.

BENJAMIN F. BLEDSOE,
United States District Judge. [4]

Due service of within Citation on Appeal, and receipt of copy thereof, is hereby admitted this 26th day of December, 1914.

H. L. CLAYBERG,,
CLAYBERG & WHITMORE,
Solicitors for Complainant and Appellee, E. Thompson.

[Endorsed]: No. B. 46-Eq. United States District Court for the Southern District of California. Thomas W. Peck, Stella Schuler and Joseph K. Hutchinson, Appellants, vs. E. Thompson, Appellee. Citation on Appeal. Filed Dec. 28, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk.

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. B. 46—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PECK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

[5]

*In the District Court of the United States, Southern
District of California, Southern Division.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PECK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Bill in Equity.

Now comes the above-named complainant and for cause of action against defendants above named complains and alleges:

That complainant is now, and at all times herein-after stated was, a citizen of the United States and of the State of New Jersey, and a resident of the State of New Jersey; that the defendants Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson,

and each of them, now are, and at all times herein-after mentioned were citizens of the United States and of the State of California, and residents of the State of California; that the amount in controversy between the plaintiff and defendants herein in this action exceeds, exclusive of costs and interest, the sum of Three Thousand Dollars (\$3,000.00); that the real estate and placer mining claims affected by this suit are situate in San Bernardino County, State of California, that neither the said complainant nor the said defendants, or either of them, are now, nor for a long time prior to the commencement of this suit, have they or either of them been in the actual possession of the said placer mining claims, herein-after particularly described. [6]

I.

That during the year 1910, plaintiff jointly with one H. C. Fursman, W. Huff, H. A. Baker, R. Waymire, P. Perkins, D. Smith and defendant, Thos. W. Pack, duly located and recorded one hundred seventy-five certain placer mining claims, herein-after more particularly described, situate in and upon Searles Borax Lake, County of San Bernardino, State of California; that plaintiff is now, and ever since the date of said locations, has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims, and each of them; that the said one hundred seventy-five placer mining claims above referred to are more particularly described, named and numbered as follows, and are more fully described in said notices of locations, copies whereof are recorded in the office of

the County Recorder of San Bernardino County, State of California, in Volume 82 of Mining Records, at the pages of said volume hereinafter designated following the respective names of said placer mining claims, to wit:

"The Soda No. 1 Placer Mining Claim," at page 131 thereof;
"The Soda No. 2 Placer Mining Claim," at page 131 thereof;
"The Soda No. 3 Placer Mining Claim," at page 132 thereof;
"The Soda No. 4 Placer Mining Claim," at page 132 thereof;
"The Soda No. 5 Placer Mining Claim," at page 133 thereof;
"The Soda No. 6 Placer Mining Claim," at page 133 thereof;
"The Soda No. 7 Placer Mining Claim," at page 134 thereof;
"The Soda No. 8 Placer Mining Claim," at page 134 thereof;
"The Soda No. 9 Placer Mining Claim," at page 135 thereof;
"The Soda No. 10 Placer Mining Claim," at page 135 thereof;
"The Soda No. 11 Placer Mining Claim," at page 136 thereof;
"The Soda No. 12 Placer Mining Claim," at page 136 thereof;
"The Soda No. 13 Placer Mining Claim," at page 137 thereof;
"The Soda No. 14 Placer Mining Claim," at page 137 thereof;

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"The Soda No. 15 Placer Mining Claim," at page 138 thereof;
"The Soda No. 16 Placer Mining Claim," at page 138 thereof;
"The Soda No. 17 Placer Mining Claim," at page 139 thereof;
"The Soda No. 18 Placer Mining Claim," at page 139 thereof;
"The Soda No. 19 Placer Mining Claim," at page 140 thereof;
"The Soda No. 20 Placer Mining Claim," at page 140 thereof;
"The Soda No. 21 Placer Mining Claim," at page 141 thereof;
"The Soda No. 22 Placer Mining Claim," at page 141 thereof;
"The Soda No. 23 Placer Mining Claim," at page 142 thereof;
"The Soda No. 24 Placer Mining Claim," at page 142 thereof;
"The Soda No. 25 Placer Mining Claim," at page 143 thereof;
"The Soda No. 26 Placer Mining Claim," at page 143 thereof;
"The Soda No. 27 Placer Mining Claim," at page 144 thereof;
"The Soda No. 28 Placer Mining Claim," at page 187 thereof;
"The Soda No. 29 Placer Mining Claim," at page 195 thereof;
"The Soda No. 30 Placer Mining Claim," at page 218 thereof;
"The Soda No. 31 Placer Mining Claim," at page 187 thereof;

"The Soda No. 32 Placer Mining Claim," at page 146 thereof;
"The Soda No. 33 Placer Mining Claim," at page 147 thereof;
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"The Soda No. 140 Placer Mining Claim," at page 200 thereof;
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"The Soda No. 141 Placer Mining Claim," at page 201 thereof;
"The Soda No. 142 Placer Mining Claim," at page 201 thereof;
"The Soda No. 143 Placer Mining Claim," at page 202 thereof;
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"The Soda No. 152 Placer Mining Claim," at page 206 thereof;
"The Soda No. 196 Placer Mining Claim," at page 207 thereof;
"The Soda No. 197 Placer Mining Claim," at page 207 thereof;
"The Soda No. 198 Placer Mining Claim," at page 208 thereof;
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"The Soda No. 200 Placer Mining Claim," at page 209 thereof;
"The Soda No. 201 Placer Mining Claim," at page 209 thereof;
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"The Soda No. 205 Placer Mining Claim," at page 211 thereof;
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"The Soda No. 207 Placer Mining Claim," at page 212 thereof;
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"The Soda No. 216 Placer Mining Claim," at page 217 thereof; "The Soda No. 217 Placer Mining Claim," at page 217 thereof; "The Soda No. 218 Placer Mining Claim," at page 218 thereof.

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II.

That during the month of September, 1914, the above-named defendants caused to be served upon plaintiff, a paper which purports to be a notice of forfeiture, a copy of which said so-called "Notice of Forfeiture" is hereto attached, marked Exhibit "A" and made a part hereof. That in and by said pretended Notice of Forfeiture it appears that all of plaintiff's right, claim, title and interest in and to the said one hundred seventy-five above described placer mining claims, and each thereof, will be forfeited and a cloud cast upon plaintiff's title thereto within ninety days from the date of service of said so-called Notice of Forfeiture upon this plaintiff, unless plaintiff, within said ninety days, pays to defendants or to defendant, Joseph K. Hutchinson, for said defendants, the sum of \$700.00, claimed to be one-eighth of the total amount of money claimed to have been expended by said defendant Pack upon said claims in the years 1911 and 1912 as recited in said pretended Notice of Forfeiture. (Exhibit "A.")

III.

Plaintiff alleges that the said defendant, Thos, W. Pack, did not expend, or cause to be expended, during the years 1911 and 1912, or during any other year or at any other time, or at all, the sum of \$5,600.00, or any part or portion thereof, or any other sum or sums or any sum at all of his own

money or funds upon said one hundred seventy-five above-described placer mining claims, or upon any of them, or upon any placer mining claim or claims located and recorded by this plaintiff, or by this plaintiff and others, or in which this plaintiff had or has any interest, in the County of San Bernardino, State of California, or elsewhere, for labor and improvements, or for labor or improvements thereupon, or upon any of them, or for any purpose [14] whatsoever, or at all. Plaintiff further alleges that the said Thos. W. Pack did not expend or cause to be expended, during the years 1911 and 1912, or during any other year, or at any other time, or at all, the sum of \$100.00 or any part or portion thereof, of his own money or funds, or any other sum or sums, or any sum at all, upon each, or upon any or all of said above described one hundred seventy-five placer mining claims, or upon any placer mining claim or claims, located and recorded by this plaintiff, or by this plaintiff and others, or in which this plaintiff had or has any interest in the County of San Bernardino, State of California, or elsewhere, for labor and improvements, or for labor or improvements thereupon, or upon any of them, or for any purpose whatsoever, or at all.

IV.

That said pretended Notice of Forfeiture does not, in any way, describe the kind, character or nature of the pretended labor and improvements, or labor or improvements, claimed to have been done and performed upon said claims, or any of them,

during the years 1911 and 1912, by the said Thos. W. Pack.

That plaintiff is unable to ascertain from said pretended Notice of Forfeiture whether the said defendant Pack claims to have actually expended, of his own money or funds, in labor and improvements, or in labor or improvements, upon each of said placer mining claims, the said sum of \$100.00, or the sum of \$5,600.00 upon all of them, or any other sum or amount, or whether the said defendant Pack claims to have expended such money in the transportation of men and supplies to Searles Borax Lake for the purpose of having done upon each and all of said placer mining claims the annual representation work for the years 1911 and 1912; that plaintiff cannot ascertain from the said pretended Notice of Forfeiture whether the amounts claimed [15] to have been expended by said defendant Pack of his own money or funds upon said placer mining claims, or upon any of them, if he ever expended any money at all thereon, was the value of \$100.00 for each claim, or of the value of \$5,600.00 for all, or whether such labor and improvements, or labor or improvements increased the value of each of said claims in the sum of \$100.00, or the value of them all in the sum of \$5,600.00, or whether said pretended labor and improvements, or labor or improvements tended in any way to develop any or all of said placer mining claims, or increased or aided in availability for taking ores or minerals from said claims, or from any of them; that this plaintiff further alleges upon information and be-

lief that the said defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said placer mining claims, or any of them, for the years 1911 and 1912, expended a greater part or portion, or all of such money, in the transportation of men and supplies to Searles Borax Lake, San Bernardino County, California, where said placer mining claims are located, as aforesaid, and in furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported to said Searles Borax Lake for the purpose of performing said representation work during said year upon said claims.

That said pretended Notice is executed, made and signed by defendants Thos. W. Pack, S. Schuler and Joseph K. Hutchinson that the same discloses upon its face that neither the said Schuler or the said Hutchinson, or either, or both of them, had any interest or ownership in or to the said placer mining claims mentioned therein, or in or to any part or portion of them, during the years 1911 and 1912, or during the time it is claimed Thos. W. Pack expended money for labor and improvements thereon, and that neither the said S. Schuler, or the said Joseph K. Hutchinson ever expended, or caused to be expended the money named in [16] said pretended Notice of Forfeiture, or any money thereon;

V.

That on or about the 25th day of December, 1913, defendant S. Schuler made, executed, acknowledged and delivered her deed and conveyance to one J. A. Shellito, whereby she transferred and conveyed to

said J. A. Shellito all of her right, title and interest in and to said above-described placer mining claims, together with her right, title and interest in and to certain other placer mining claims therein described; that thereafter and on or about the 14th day of January, 1914, the said defendant Schuler assumed to convey to defendant Hutchinson the same interest and property that she, the said defendant Schuler, had theretofore conveyed to the said J. A. Shellito, as hereinabove alleged; that the said defendant Hutchinson, at the time of receiving said conveyance was fully informed and had full knowledge that the said defendant Schuler had conveyed all the rights, interests, claims and property therein described to the said J. A. Shellito, a long time prior to the execution of said conveyance by said Schuler to said Hutchinson; that plaintiff further alleges that the said Hutchinson took said conveyance from the said defendant Schuler for the sole and only use and benefit of the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or for all or a part of them, and not for his own use and benefit, and in pursuance of a combination and conspiracy by and between these defendants in this suit and the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company wherein and whereby the said defendants, and the said above-named corporations confederated and combined together to injure plaintiff and to deprive and defraud him of all his right, title and interest in and to said above described placer mining claims. [17]

VI.

Plaintiff further alleges upon his information and belief that the pretended transfer of the said one-eighth interest of the said Thos. W. Pack in and to these said above-described claims by the said S. Schuler to the said Joseph K. Hutchinson, if such transfer was made at all, as set forth in said pretended Notice of Forfeiture, was made and done pursuant to and in order to carry out a combination and conspiracy to injure plaintiff and to deprive and defraud him of all his right, title and interest in and to said placer mining claims and each and all of them; that the said pretended transfer to the said Joseph K. Hutchinson by the said S. Schuler was made and done, if made and done at all, wholly and totally without a valuable or other consideration; that if any consideration at all was paid by the said Joseph K. Hutchinson to the said S. Schuler for the said transfer, the same was advanced and paid by the Foreign Mines and Development Company, a corporation, or by the American Trona Company, a corporation, or by the California Trona Company, a corporation, or by part or all of them, or by some person or persons authorized by them, or part or all or them, or acting for them, or for part or all of them, and on their behalf, or on the behalf of part or all of them; that the said Joseph K. Hutchinson took the title to the said one-eighth interest in and to these said above-described claims, if he took the title at all, for the sole benefit and use of the said Foreign Mines and Development Company, or the American Trona Company, or the California Trona

Company, or for part or all of them, and not for his own use and benefit; that the said Joseph K. Hutchinson now claims to hold the said title to the said one-eighth interest in and to the said above-described claims, if such title ever passed to him, for the sole and only use and benefit of the said Foreign Mines and Development Company, the said American [18] Trona Company, the said California Trona Company, or for the sole use and benefit of part or all of them, and not for his own use and benefit.

Plaintiff further alleges that the Foreign Mines and Development Company, the American Trona Company and the California Trona Company claim rights and interest in and to the mineral lands covered by said placer locations so made and recorded by plaintiff and others, as hereinabove alleged, and that said Foreign Mines and Development Company, the American Trona Company and the California Trona Company have for some years last past been endeavoring to defeat the locations so made by plaintiff, and others, as hereinabove alleged, and that the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company have, and each and every of them has, as plaintiff is informed and believes, fraudulently attempted to procure the right, title and interest of defendant, Pack, in and to said locations so made by plaintiff and others as hereinabove alleged, for the express purpose, and none other, of using the said interest of the said Pack in and to said locations, in such a way and manner as to destroy all plaintiff's rights and interest therein, and

to defraud this plaintiff out of all interest in and to said claims, and each of them; this plaintiff further alleges on like information and belief that the defendant, Joseph K. Hutchinson, has been acting as the agent, representative and attorney of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, in endeavoring to deprive and defraud plaintiff of his rights and title in and to said placer mining locations, as above alleged; that the said defendant, Joseph K. Hutchinson, under the direction and orders of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, [19] fraudulently obtained said transfer of the said one-eighth interest in and to said placer mining claims, if he obtained said transfer at all, from defendant Schuler, in pursuance to the combination and conspiracy entered into and carried on by and between said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, and the said defendants herein, and each of them, to injure plaintiff and defraud and deprive him of all of his right, title and interest in and to said claims, and each of them; that in further pursuance of said combination and conspiracy, and under the orders and direction of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or all or part of them, said defendant, Joseph K. Hutchinson, and the said defendants Schuler and Pack,

caused to be served upon plaintiff the pretended Notice of Forfeiture above described (Exhibit "A"); that the fraudulent transfer of the said one-eighth interest in and to said claims by the said defendant Schuler to the said defendant Hutchinson, if any transfer was made at all, and the serving of the said pretended Notice of Forfeiture upon the said plaintiff as aforesaid, was all done in pursuance to and in the carrying out of a combination and conspiracy entered into by and between the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or all or part of them, and the said defendants, and each of them, confederated together for the purpose of injuring plaintiff and depriving and defrauding him of all his right, title and interest in and to said placer mining claims above described.

VII.

Plaintiff further alleges upon his information and belief that the said pretended Notice of Forfeiture was prepared and [20] served upon him pursuant to and in the furtherance of such combination and conspiracy between the defendants herein and the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company,, and that the said Thos. W. Pack never, during the years 1911 and 1912, or at any other time, expended or caused to be expended, the sum of \$5,600.00 of his own funds or money, or any other sum or amount in and upon said claims, or upon one, or any of them, for any purpose whatsoever, and that neither he nor any of the defendants

herein, or their co-conspirators are entitled to any contribution from plaintiff in any sum or amount whatsoever.

VIII.

That plaintiff is informed and believes that none of the money defendant Pack claims to have expended as and for representation work, or for labor and improvements, or labor or improvements, on the above described claims, or any thereof, if expended by the said Pack at all, was expended by him for the actual representation and assessment work upon the said claims, or any of them, as required by law; but plaintiff alleges that defendant Pack paid the moneys set forth in the said pretended Forfeiture Notice, if he paid any money at all, for certain goods, wares and merchandise, furnished to certain laborers, employed by plaintiff and his colocators doing assessment work on said claims in the years 1911 and 1912, and for automobile hire in transporting said laborers and supplies to and from said placer mining claims.

IX.

That on the 14th day of January, 1913, one W. W. Colquhoun, through his attorney, Joseph K. Hutchinson, one of the defendants, herein, filed a suit against defendant Pack, one Henry E. Lee and one T. O. Toland, in the Superior Court of the State of [21] California, in and for the City and County of San Francisco, which said suit is entitled "W. W. Colquhoun, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, a Copartnership, and Thos. W. Pack, Henry E. Lee and T. O. Toland, as Individuals, Defendants, and numbered 46,604

in the records of the Superior Court of the City and County of San Francisco, State of California; that in the verified complaint in said suit plaintiff, W. W. Colquhoun, alleges that he is the assignor of C. J. and E. E. Teagle, and that the sum of \$750.00 is due him for certain goods, wares and merchandise sold and delivered to the said Pack and the other two defendants named in said suit, during the years 1911 and 1912, and that the same had never been paid. This plaintiff alleges upon information and belief that the said goods sued for in said action were purchased by said Pack from C. J. and E. E. Teagle in the town of Johannesburg, Kern County, California; that the whole amount of said goods, wares and merchandise so purchased by the said Pack from the said Teagles was the sum of \$969.00 and that the said Teagles admit that the sum of \$219.00 has been paid upon said account; that this plaintiff further alleges upon his information and belief that the said sum of \$750.00, sued for in said action, constitutes part of the amount which the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above-described placer mining claims, and for the pretended payment of which the said defendants are now seeking contribution from this plaintiff and threatening a forfeiture of his rights and interests in and to said above described placer mining claims, upon his failure so to contribute, as recited in their said pretended Notice of Forfeiture; that on the 4th day of February, 1914,

a judgment was rendered in said suit against the said Pack, in favor of plaintiff, in the whole amount sued for, which said [22] judgment is now standing of record and docketed in Volume No. 29 of Judgments at page 484 of the records of the County Clerk of the City and County of San Francisco, State of California, and has never been satisfied or discharged, either in whole or in part, or set aside, vacated or modified.

X.

That on the 20th day of January, 1913, one M. A. Varney, by his attorney, Joseph K. Hutchinson, one of the defendants herein, filed a suit in the Superior Court of the City and County of San Francisco, State of California, against defendant Thos. W. Pack, one Henry E. Lee and one T. O. Toland, which said suit was entitled in said Superior Court, "M. A. Varney, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, as individuals, and Thos. W. Pack, Henry E. Lee and T. O. Toland, a Copartnership, Defendants," and numbered 46,692 in the records of the said Superior Court; that in the verified complaint in said suit the plaintiff therein, the said M. A. Varney, alleged that during the years 1911 and 1912 he furnished supplies and rendered services to defendant Thos. W. Pack and the other defendants therein, in the sum of \$4,180.00, of which said sum only \$535.00 had been paid; that thereafter and on or about the 4th day of February, 1913, a judgment was entered in said action against the said Thos. W. Pack, in favor of plaintiff, in the whole amount sued for. That plaintiff is informed and believes and there-

fore alleges the fact to be that said judgment in said suit is still standing of record and has never been satisfied, set aside, vacated or modified. That plaintiff is informed and believes and therefore alleges the fact to be that the last above named action was brought by the said M. A. Varney to recover the sum of \$4,180.00 from the said Thos. W. Pack, Henry E. Lee and T. O. Toland, for the use of two certain automobiles and certain supplies [23] furnished by the said M. A. Varney to the said Thos. W. Pack, at his special instance and request, in the years 1911 and 1912, and used by the said Thos. W. Pack to transport men hired by plaintiff and his colocators to do the annual assessment work on said above-described placer claims for said years, and supplies for said men, from the City of Los Angeles and elsewhere to the above described placer claims on Searles Borax Lake, San Bernardino County, California; that plaintiff alleges upon his information and belief that the said sum of \$4,180.00 sued for in said action, constitutes part of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the years 1911 and 1912 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which the said defendants are now seeking contribution from this plaintiff, and threatening a forfeiture of his rights and interests to and to said above described placer claims upon his failure so to contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A.")

XI.

That on the 2d day of September, 1913, one W. W. Colquhoun, by his attorneys, Joseph K. Hutchinson, one of the defendants herein, and Walter Slack, filed a suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against this plaintiff and H. C. Fursman, W. Huff, P. Perkins, H. A. Baker, R. Waymire, D. Smith and S. Schuler, to recover the sum of \$750.00 alleged to be due said plaintiff for the value of certain goods, wares and merchandise, which said suit is entitled in said Superior Court, "W. W. Colquhoun, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a Copartnership, [24] and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as Individuals, Defendants," and numbered 50,723 in the files and records of the said Superior Court; that in his verified complaint in said suit the said W. W. Colquhoun alleges that C. J. and E. E. Teagle assigned to him the said claim sued upon in said action; he further alleges that during the years 1911 and 1912 the said C. J. and E. E. Teagle furnished certain goods, wares and merchandise of the value of \$750.00 to defendants therein, including this plaintiff, and that no part of said sum had been paid; that plaintiff herein alleges the fact to be that said suit was brought by plaintiff for the value of the said goods, wares and merchandise claimed to have been sold and delivered by plaintiff's assignors to Thos. W. Pack in the years 1911 and 1912, and it

is claimed that the same were used by a camp of men doing assessment work upon the claims hereinabove described, together with other placer mining claims, during the years 1911 and 1912; that the whole amount of the value of said goods, so alleged to have been sold was \$969.00, but that the said plaintiff in said suit admitted the payment of the sum of \$219.00 on account. That thereafter and on or about the 27th day of October, 1913, R. Waymire filed his verified answer to the complaint in said action; that thereafter a trial was had of the issues therein, and after judgment had been entered against R. Waymire, the said Court on the 11th day of August, 1914, granted the motion of R. Waymire for a new trial thereof; that plaintiff in said suit, as this plaintiff is informed and believes, is now prosecuting an appeal from the order of said Court granting the said motion for a new trial. That plaintiff alleges upon his information and belief that the said sum of \$750.00 sued for in said action, and the sum of \$219.00 admitted to have been paid on account therein, constitute part of the amount the said defendants in this suit claim in their said pretended Notice of [25] Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the years 1911 and 1912 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which by the said Pack, the said defendants are now seeking contribution from this plaintiff, and threatening a forfeiture of his rights and interests in and to said above described claims upon his failure to so contribute, as recited

in their said pretended Notice of Forfeiture.

XII.

That on the 30th day of August, 1913, one M. A. Varney, by his attorneys, Joseph K. Hutchinson, one of the defendants herein, and Walter Slack filed a suit in the Superior Court of the City and County of San Francisco, State of California, against H. C. Fursman, W. Huff, P. Perkins, H. A. Baker, R. Waymire, D. Smith, S. Schuler and this plaintiff, which said suit is entitled in said Superior Court, "M. A. Varney, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a Copartnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as Individuals, Defendants," and numbered 50,724 in the files and records of the said Superior Court; that in the verified complaint in said suit the plaintiff therein, the said M. A. Varney, alleged that during the years 1911 and 1912 he furnished supplies and rendered services to the defendants therein in the sum of \$4,170.00, of which said sum only \$500.00 has been paid; that plaintiff alleges the fact to be that the said action was brought by the said M. A. Varney to recover the sum of \$3,670.00 from the said defendants for the use of two certain automobiles and certain supplies furnished by the said M. A. Varney to the said Pack at his special instance and request, in the years 1911 and 1912 and used by the said Pack [26] to transport men and supplies from the City of Los Angeles and elsewhere to the

above described claims on Searles Borax Lake, San Bernardino County, California.

That thereafter and on or about the 20th day of October, 1913, R. Waymire filed his verified answer to the Complaint in said action; that thereafter various proceedings were had therein and a trial thereof was had before the Court, and that on or about the 16th day of July, 1914, R. Waymire moved the Court for a nonsuit in said action, which motion for nonsuit was by the Court granted; that on or about the 7th day of October, 1914, judgment was entered in favor of R. Waymire, which said judgment is now of record in the office of the Clerk of said Superior Court in Volume 77 of Judgments at page 93 thereof. That this plaintiff alleges upon his information and belief that the said sum of \$3,670.00, sued for in said action, and the sum of \$500.00 alleged to have been paid on account therein, constitute part of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the years 1911 and 1912 for doing the assessment work on the above described placer mining claims, and for the pretended payment of which, by the said Pack, the said defendants are now seeking contribution from this plaintiff, and threatening to forfeit all of plaintiff's rights, title and interest in and to said placer mining claims, if he does not so contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A").

XIII.

That on or about the 26th day of February, 1914,

one Raphael Mojica filed an action in the Superior Court in the City and County of San Francisco, State of California, against this [27] plaintiff, his colocators and defendant S. Schuler, as assignee of the defendant Pack, one Henry E. Lee and various other parties to recover the sum of \$1,443.50, which said action is entitled "Raphael Mojica, plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, a copartnership, H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, an association, and Henry E. Lee, Thomas O. Toland, H. C. Fursman, W. Huff, Rudolph Waymire, P. Perkins, H. A. Baker, E. Thompson, Dudley Smith, Stella Schuler, John Doe, Jane Roe, Richard Roe and Mary Roe, Defendants," and is numbered 54,989 in the files and records of said Superior Court; that in his verified complaint in said action the said plaintiff pretends to be the assignee of thirty certain Mexican laborers, and pretends therein that each of these said Mexican laborers named therein had assigned to him their claims against the defendants therein for doing certain labor and work, in and upon the above-described placer claims by way of assessment work thereon, during the year 1912; that said action is now at issue in said Superior Court; that plaintiff is informed and believes and therefore alleges the fact to be that the said sum of \$1,443.50 sued for in said action constitutes a portion of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the

said Thos. W. Pack in the years 1911 and 1912 for doing the assessment work on the above-described placer mining claims and for the pretended payment of which the said defendants are now seeking contribution from this plaintiff, and threatening to forfeit all of plaintiff's right, title and interest in and to said placer mining claims if he does not so contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A"); that plaintiff is informed and believes that no part of said sum of \$1,443.50 sued for in said action has been paid by [28] the said Thos. W. Pack, or by anyone whomsoever for him.

XIV.

That a short time prior to the dates when the said defendant Thos. W. Pack claims to have expended money for the purpose of doing assessment work on the above-described placer mining claims, as claimed in defendants' pretended Notice of Forfeiture (Exhibit "A"), one Henry E. Lee, as the duly authorized agent and representative of this plaintiff, and of his colocators, paid to the said defendant, Thos. W. Pack, for this plaintiff, and for his said colocators, in their respective proportionate shares, the sum of \$1,000.00, as a portion of their *pro rata* contribution for the doing of said actual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and used in said actual assessment work thereon; that as plaintiff is informed and believes the said Thos. W. Pack, did so use the said sum of \$1,000.00 for said purpose in said year and that the said amount should

be credited to this plaintiff and his colocators in proportion to their respective interests in the said placer mining claims.

XV.

That plaintiff further alleges that during the year 1911, and prior to the time any money is claimed to have been expended by the said defendant Pack in his said pretended Notice of Forfeiture (Exhibit "A"), the said defendant Pack duly acknowledged in writing that he was indebted to one Henry E. Lee, the duly authorized agent of plaintiff, and his colocators, in the sum of \$1,836.00, and that the said Henry E. Lee, acting as such agent for plaintiff and his colocators, directed the said defendant Pack to use and utilize all of said money, or so much thereof as might be necessary, in the annual representation of the placer [29] mining claims hereinabove described in said pretended Notice of Forfeiture (Exhibit ("A")) for the years 1911 and 1912, and that the said defendant Pack agreed with the said Henry E. Lee that he would so utilize and use said money; that plaintiff claims that said sum of \$1,836.00 is and should be a portion of the money expended by the said defendant Pack, as described in the said pretended Notice of Forfeiture (Exhibit "A"); that the said money and indebtedness was money due and owing to this plaintiff and his colocators from the said defendant Pack, duly evidenced by his written acknowledgment of such indebtedness to the said Henry E. Lee, the duly authorized agent of this plaintiff and his colocators, and that said amount should be credited to this plaintiff and his colocators

in proportion to their respective interests in their said placer mining claims.

XVI.

Plaintiff further alleges that in and by the terms of said pretended Notice of Forfeiture (Exhibit "A") it is not disclosed that the said defendant Pack, or either of the other defendants, or anyone in their behalf, or in behalf of either of them, ever expended the sum of \$100.00 on each or any of the placer claims described in said pretended Notice of Forfeiture (Exhibit "A"); that by said pretended Notice of Forfeiture (Exhibit "A") it is claimed by the defendants in this action that \$5,600.00 was expended for annual representation of one hundred seventy-five placer mining claims described in said pretended Notice of Forfeiture, for the years 1911 and 1912, while in truth and in fact the Statutes of the United States and of the State of California require that \$100.00 in labor or improvements be placed upon each separate claim for each separate year and that the sum of \$35,000.00 would be required by said Statutes above referred to, to fully represent each and all of said one hundred seventy-five claims for the two [30] years 1911 and 1912; that it is not claimed in said pretended Notice of Forfeiture (Exhibit "A") and cannot be ascertained therefrom upon which separate placer mining claim or claims, out of the one hundred seventy-five placer mining claims described therein, said defendant Pack, or either of said defendants, claim to have expended any money for labor or improvements in the annual representation for either of said years 1911 and

1912; that it does not appear from said pretended Notice of Forfeiture (Exhibit "A") and it cannot be ascertained therefrom, which particular placer claim or claims was represented by the said Pack, or by either of said defendants, if any were represented at all, either for the year 1911 or for the year 1912; that it does not appear from said pretended Notice of Forfeiture (Exhibit "A") and it cannot be ascertained therefrom, how much money, if any, the said defendant Pack, or either of said defendants, expended in labor or improvements, on any of said placer claims, either for the year 1911 or for the year 1912; that it does not appear from said pretended Notice of Forfeiture (Exhibit "A") and it cannot be ascertained therefrom whether the said defendant Pack, or either of said defendants, expended the sum of \$100.00 in labor or improvements upon either of said placer claims, either for the year 1911 or 1912, or whether the improvements upon either of said placer claims, either for the year 1911 or 1912, or whether the said \$5,600.00 so claimed to have been expended by said defendant Pack was expended upon all of said claims, or upon which of said one hundred seventy-five placer claims, and if so expended, how much of the same was expended upon either or any of said one hundred seventy-five claims.

XVII.

This plaintiff further alleges that simultaneously with the service of said pretended Notice of Forfeiture (Exhibit "A") [31] upon this plaintiff, the said defendants caused to be served upon this plaintiff two other and further pretended Notices of For-

feiture, by one of which the said defendant Pack, and each and all of said defendants, claimed that said defendant Pack had expended the sum of \$1,200.00 upon twelve of said one hundred seventy-five placer claims, described in said (Exhibit "A"), namely the Soda Placer Mining Claims numbered 68, 69, 70, 71, 72, 87, 88, 89, 90, 91, 111 and 112, in the annual representation of said claims for the year 1911.

XVIII.

This plaintiff further alleges that simultaneously with the service of said pretended Notice of Forfeiture (Exhibit "A") upon this plaintiff, the said defendants caused to be served upon this plaintiff two other and further pretended Notices of Forfeiture, by one of which the said defendant Pack, and each and all of said defendants, claimed that said defendant Pack had expended the sum of \$4,400.00 upon forty-four of said one hundred seventy-five placer claims, described in said (Exhibit "A"), namely the Soda Placer Mining Claims numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 48, 49, 50, 67, 70, 73, 86, 92, 93, 113, 114, 130 and 218, in the annual representation of said claims for the year 1912.

XIX.

That plaintiff is informed and believes and therefore alleges that the \$5,600.00 which said defendant Pack, and each and all of the other said defendants claim as having been expended by said Pack upon said one hundred seventy-five placer claims in the

years 1911 and 1912 is the same money and cash as the \$1,200.00 and \$4,400.00 claimed to have been expended by said [32] Pack in doing the annual representation work upon said twelve placer claims for the year 1911 and said forty-four placer claims for the year 1912, as set forth in the said other pretended Notices of Forfeiture above described, and therefore this plaintiff claims that none of said defendants, and neither of them, are entitled to any contribution from this plaintiff under said pretended Notice of Forfeiture (Exhibit "A").

XX.

Plaintiff further alleges that while plaintiff and his colocators were engaged in the performance of the annual representation upon said one hundred seventy-five placer claims for the year 1912, they were forcibly prevented from completing said annual representation upon the whole of said one hundred seventy-five placer claims by the Foreign Mines and Development Company, American Trona Company and the California Trona Company, or by each and all of said corporations, or by their or each of their agents, employees, representatives, servants or attorneys, and that the employees of this plaintiff and his colocators, and the persons representing plaintiff and his colocators in doing said annual representation upon said one hundred seventy-five placer claims for the year 1912, were forcibly ejected and driven from said placer claims by the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or by each or all of them, or by their or

each of their agents, representatives, employees, servants or attorneys, and threatened with great physical violence and injury in case they or any of them returned to said placer claims, or any of them, or attempted to place upon said claims, or any of them, any labor or improvements in the annual representation thereof for the year 1912; plaintiff therefore claims that none of said defendants, and neither of them, are entitled to any contribution from this [33] plaintiff, for the annual representation of said one hundred seventy-five placer claims, or either of them, for the year 1912.

XXI.

Plaintiff has no means of knowing or of ascertaining what, if any, amount of his own money or funds said defendant has expended on said placer mining claims, or upon any of them, for annual representation work for the years 1911 and 1912, and that the only method whereby plaintiff can procure said information is through this Court and by its order compelling the defendant, Thos. W. Pack, to account for and disclose any and all moneys expended or spent by him upon said placer mining claims, above described, or upon any of them, during the years 1911 and 1912, for the purpose of representing same, and each and all thereof, for said year, if any money at all was so expended by the said Thos. W. Pack for such purpose, and whose money, if any, was expended by him, how expended, and what amount of the same, if any, was so expended and spent for labor and improvements, or labor or improvements upon the above-described claims, or upon any of them,

which could lawfully be counted, considered or applied as such representation work, and for the expenditure of which he would be entitled to *pro rata* contribution from this plaintiff.

XXII.

Plaintiff hereby and herewith offers and stands ready to pay to the said Thos. W. Pack, or these defendants, or either of them, his proportionate share of any moneys belonging to the said defendant Thos. W. Pack which this Court finds were expended by the said Thos. W. Pack on the above-described claims, or any of them, as actual representation work thereon for the years 1911 and 1912, if the Court finds he so expended any money at all for such purpose. [34]

XXIII.

That plaintiff further alleges that if the said defendants are allowed to proceed under said pretended Notice of Forfeiture (Exhibit "A") they will, at the expiration of ninety days from and after the date of the service of the said pretended Notice of Forfeiture, file and record a copy of said Notice of Forfeiture (Exhibit "A") and an affidavit of service, with the County Recorder of San Bernardino County, California, and claim and assert that all the right, title and interest of this plaintiff in and to said placer claims, and each and all thereof, has been duly and legally forfeited and extinguished and thereby and by means thereof a cloud will be cast upon the title and interest of this plaintiff in and to said placer mining claims, and each of them, and plaintiff be compelled to institute and prosecute a

great number of suits to remove said cloud, at a great and exorbitant expense; that unless defendants are enjoined and restrained from proceeding to declare the forfeiture of plaintiff's rights in and to said placer claims and each of them as claimed in their said Notice of Forfeiture (Exhibit "A") this plaintiff will be compelled to institute, prosecute and maintain a multiplicity of suits in order to remove the clouds cast upon his said title and interest in and to each of said placer mining claims.

XXIV.

That plaintiff has no plain, speedy or adequate remedy at law in the premises, and unless defendants, and each of them, are restrained and enjoined from declaring a forfeiture of all of plaintiff's right, title and interest in and to said claims, and each thereof, pursuant to and in accordance with the pretended Notice of Forfeiture (Exhibit "A"), plaintiff will be irrevocably and irreparably damaged and injured, and be defrauded or deprived of all of his right, title and interest in and to said placer mining claims, and each of them. [35]

WHEREFORE plaintiff prays:

1. For a decree of this Court preventing any forfeiture of any right, title, interest or claim of this plaintiff in and to said placer mining claims above described, and in and to each and all of them.
2. For a decree of this Court directing said defendants, and each of them, to account and disclose to this plaintiff, and to this Court, for all moneys, if any, belonging to the said Pack and constituting his own personal funds, and used and expended by him

in procuring labor or improvements, or labor and improvements, which could be legally counted, considered or claimed as a representation or annual assessment work for the years 1911 and 1912, on the above-described placer mining claims, and on each of them, and that this Court ascertain and determine the amount, if any, thereof, and the proportion, if any, which this plaintiff should pay.

3. That these defendants, and each of them, their agents, attorneys, servants and employees be permanently restrained and enjoined from taking any steps to perfect or establish any forfeiture of plaintiff's rights, titles and interests in or to said placer mining claims, hereinabove described, or in or to any part or portion thereof, or any of them, and that in the meantime during the pendency of this suit, and until the final determination thereof on the merits, said defendants, and each of them, their attorneys, agents, servants, representatives or employees, and each and all of them, be restrained and enjoined from taking any steps to cast a cloud upon the title, or to forfeit or to perfect or establish any forfeiture of plaintiff's rights, titles or interests in or to said placer mining claims hereinabove described, or any part or portion thereof, or any of them. [36]

4. For plaintiff's costs of suit.

5. For such other and further relief as this Honorable Court may deem just and equitable in the premises.

H. L. CLAYBERG,
CLAYBERG & WHITMORE,
Attorneys for Complainant. [37]

*In the District Court of the United States, Southern
District of California.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,
Defendants.

State of California,

City and County of San Francisco,—ss.

Henry E. Lee, being first duly sworn, upon his oath says:

That he has read the complaint in the above-entitled action to which this affidavit is attached, and knows the contents thereof; that he has personal knowledge of all the facts and matters therein alleged, and knows them to be true, except as to those matters therein alleged upon information and belief, and as to them, he believes them to be true.

That he makes this affidavit for the plaintiff and on his behalf, for the reason that the said plaintiff is not a resident of the City and County of San Francisco, State of California, and is not at the date of the making of this affidavit within said State of California, or within the City and County of San Francisco wherein this affiant resides and has his office and place of business.

HENRY E. LEE

Subscribed and sworn to before me this 21st day of November, 1914.

[Seal]

H. B. DENSON,

Notary Public in and for the City and County of San Francisco, State of California. [38]

Exhibit "A" [to Bill in Equity].

NOTICE OF FORFEITURE.

710 Claus Spreckels Building,

San Francisco, California, September 14th, 1914.

E. THOMPSON:

You are hereby notified that I, the undersigned, T. W. Pack, expended during the years 1911 and 1912 the sum of Fifty-six Hundred Dollars (\$5600) for labor and improvements upon the following described placer mining claims:

Those certain placer mining claims situate in and upon Searles Borax Lake, County of San Bernardino, State of California, more particularly named and numbered as follows:

"The Soda No. 1 Placer Mining Claim," to and including "The Soda No. 152 Placer Mining Claim," together with "The Soda No. 196 Placer Mining Claim," to and including "The Soda No. 218 Placer Mining Claim," both inclusive, location notices of which said claims are recorded in Volume 82 of Mining Records of said County of San Bernardino, State of California, on pages numbers 131 to 218, both inclusive of said volume.

You are hereby further notified that said sum of Fifty-six Hundred (\$5600) Dollars was expended by me for the purpose of complying with the requirements of Section 2324 of the Revised Statutes of the

United States and amendments thereof, concerning the performance of annual labor upon mining claims.

You are hereby further notified that said amount of Fifty-six Hundred (\$5600) Dollars was the only money expended by any of the locators or owners of said placer mining claims for the purpose of complying, for the said years 1911 and 1912, with the requirements of said Section 2324 of the Revised Statutes of the United States and amendments thereof, and that no other sums whatsoever have been [39] expended by any one whomsoever for the purpose of complying with said Section 2324 for the said years 1911 and 1912.

You are hereby further notified that throughout said years of 1911 and 1912 I was the owner of an undivided one-eighth interest in said claims and therefore a co-owner with you throughout said period during which you also were the owner of an undivided one-eighth interest in said claims.

You are hereby further notified that subsequent to the making of said expenditures I transferred my said one-eighth interest to S. Schuler and that she has transferred said one-eighth interest to Joseph K. Hutchinson, who is now the owner thereof.

You are hereby further notified that I, T. W. Pack, together with said S. Schuler, and said Joseph K. Hutchinson, also undersigned, having received no contribution from you for your proportion, to wit: one-eighth of said expenditures, do and each of us hereby make demand upon you for contribution by you of your proportion of said expenditures, to wit:

the sum of Seven Hundred (\$700) Dollars, or one-eighth of said sum of Fifty-six Hundred (5600) Dollars.

You are hereby further notified that if, within Ninety (90) days from the personal service of this notice upon you, you fail or refuse to contribute your proportion of said expenditures, to wit: Seven Hundred (\$700) Dollars, or one-eighth of said sum of Fifty-six Hundred Dollars (\$5600) Dollars, by payment of the same to said Joseph K. Hutchinson, at Room 710, Claus Spreckels Building, City and County of San Francisco, State of California, he being duly authorized to collect said money and to receipt for the same, your said interest in said mining claims and each of them will become the property of the undersigned.

Dated San Francisco, California, September 14, 1914.

(Signed) S. SCHULER,
T. W. PACK,
JOSEPH K. HUTCHINSON. [40]

[Indorsed] No. B. 46-Eq. U. S. District Court, Southern District California, Southern Division.

In Equity. E. Thompson vs. Thomas W. Pack, Stella Schuler, Joseph K. Hutchinson. Bill in Equity. Filed, Nov. 24, 1914, Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. H. L. Clayberg, Clayberg & Whitmore, 937 Pacific Building, San Francisco, Attorneys for Complainant.
[41]

*In the District Court of the United States, Southern
District of California, Southern Division.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER, and
JOSEPH K. HUTCHINSON,

Defendants.

Restraining Order and Order to Show Cause.

WHEREAS, plaintiff above named has filed his verified bill in equity in the above-entitled cause against the defendants above named praying for certain equitable relief and an order of this Court restraining and enjoining defendants and each of them, during the pendency of this suit and until the final determination thereof upon its merits, from in any way or manner casting a cloud upon the title of or taking any steps toward forfeiting or declaring forfeited any of plaintiff's right, title or interest in and to certain placer mining claims in said bill of complaint and hereinafter fully described, named and numbered; and

WHEREAS, upon a reading of plaintiff's said bill of complaint it satisfactorily appears to the Court therefrom that plaintiff may suffer irreparable and irrevocable damage and injury, before the hearing of the order to show cause hereinafter set forth, unless, pending the hearing on said order to show cause, said defendants and each of them are by this Court restrained as hereinafter set forth, and other good cause appearing.

NOW THEREFORE, IT IS HEREBY ORDERED that you, the said defendants [42] Thos. W. Pack, S. Schuler and Jos. K. Hutchinson, and each of you, your and each of your attorneys, agents, servants and employees are hereby specially restrained and enjoined from in any way or manner taking any steps toward forfeiting or declaring a forfeiture of plaintiff's right, title and interest in and to certain hereinafter described placer mining claims, and each of them, pursuant to or in accordance with your pretended Notice of Forfeiture heretofore, and within ninety days prior to the date hereof, served upon plaintiff herein, a copy of which is attached to the said bill of complaint and marked Exhibit "A," until the hearing of the application of plaintiff for an injunction pendente lite in this cause, which said application is hereby set for hearing before this Court on the 7th day of December, 1914, or until the further order of this Court;

IT IS FURTHER ORDERED that you and each of you appear before this Court at 10:30 o'clock A. M., on the 7th day of December, 1914, at the Court-room of Division No. 2 of the District Court of the United States for the Southern District of California, in the Federal Building, in the City of Los Angeles, County of Los Angeles, States of California, and then and there to show cause, if any you have, why said restraining order, as hereinabove made, should not be made permanent during the pendency of this suit and until the final determination thereof on its merits.

Said placer mining claims above named are

described; numbered and named as follows, being situate on Searles Borax Lake, County of San Bernardino, State of California, the location notices of which said placer claims are recorded in Volume 82 of Mining Records in the office of the County Recorder of the said County of San Bernardino, State of California, at the following respective pages of said volume 82 set down opposite and following the hereinafter described, named and numbered placer mining claims: [43]

- "The Soda No. 1 Placer Mining Claim," at page 131 thereof;
- "The Soda No. 2 Placer Mining Claim," at page 131 thereof;
- "The Soda No. 3 Placer Mining Claim," at page 132 thereof;
- "The Soda No. 4 Placer Mining Claim," at page 132 thereof;
- "The Soda No. 5 Placer Mining Claim," at page 133 thereof;
- "The Soda No. 6 Placer Mining Claim," at page 133 thereof;
- "The Soda No. 7 Placer Mining Claim," at page 134 thereof;
- "The Soda No. 8 Placer Mining Claim," at page 134 thereof;
- "The Soda No. 9 Placer Mining Claim," at page 135 thereof;
- "The Soda No. 10 Placer Mining Claim," at page 135 thereof;
- "The Soda No. 11 Placer Mining Claim," at page 136 thereof;
- "The Soda No. 12 Placer Mining Claim," at page 136 thereof;
- "The Soda No. 13 Placer Mining Claim," at page 137 thereof;
- "The Soda No. 14 Placer Mining Claim," at page 137 thereof;
- "The Soda No. 15 Placer Mining Claim," at page 138 thereof;
- "The Soda No. 16 Placer Mining Claim," at page 138 thereof;
- "The Soda No. 17 Placer Mining Claim," at page 139 thereof;
- "The Soda No. 18 Placer Mining Claim," at page 139 thereof;
- "The Soda No. 19 Placer Mining Claim," at page 140 thereof;
- "The Soda No. 20 Placer Mining Claim," at page 140 thereof;
- "The Soda No. 21 Placer Mining Claim," at page 141 thereof;
- "The Soda No. 22 Placer Mining Claim," at page 141 thereof;
- "The Soda No. 23 Placer Mining Claim," at page 142 thereof;
- "The Soda No. 24 Placer Mining Claim," at page 142 thereof;
- "The Soda No. 25 Placer Mining Claim," at page 143 thereof;

"The Soda No. 26 Placer Mining Claim," at page 143 thereof;
"The Soda No. 27 Placer Mining Claim," at page 144 thereof;
"The Soda No. 28 Placer Mining Claim," at page 144 thereof;
"The Soda No. 29 Placer Mining Claim," at page 145 thereof;
"The Soda No. 30 Placer Mining Claim," at page 145 thereof;
"The Soda No. 31 Placer Mining Claim," at page 146 thereof;
"The Soda No. 32 Placer Mining Claim," at page 146 thereof;

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"The Soda No. 33 Placer Mining Claim," at page 147 thereof;
"The Soda No. 34 Placer Mining Claim," at page 147 thereof;
"The Soda No. 35 Placer Mining Claim," at page 148 thereof;
"The Soda No. 36 Placer Mining Claim," at page 148 thereof;
"The Soda No. 37 Placer Mining Claim," at page 149 thereof;
"The Soda No. 38 Placer Mining Claim," at page 149 thereof;
"The Soda No. 39 Placer Mining Claim," at page 150 thereof;
"The Soda No. 40 Placer Mining Claim," at page 150 thereof;
"The Soda No. 41 Placer Mining Claim," at page 151 thereof;
"The Soda No. 42 Placer Mining Claim," at page 151 thereof;
"The Soda No. 43 Placer Mining Claim," at page 152 thereof;
"The Soda No. 44 Placer Mining Claim," at page 152 thereof;
"The Soda No. 45 Placer Mining Claim," at page 153 thereof;
"The Soda No. 46 Placer Mining Claim," at page 153 thereof;
"The Soda No. 47 Placer Mining Claim," at page 154 thereof;
"The Soda No. 48 Placer Mining Claim," at page 154 thereof;
"The Soda No. 49 Placer Mining Claim," at page 155 thereof;
"The Soda No. 50 Placer Mining Claim," at page 155 thereof;
"The Soda No. 51 Placer Mining Claim," at page 156 thereof;
"The Soda No. 52 Placer Mining Claim," at page 156 thereof;
"The Soda No. 53 Placer Mining Claim," at page 157 thereof;
"The Soda No. 54 Placer Mining Claim," at page 157 thereof;
"The Soda No. 55 Placer Mining Claim," at page 158 thereof;
"The Soda No. 56 Placer Mining Claim," at page 158 thereof;
"The Soda No. 57 Placer Mining Claim," at page 159 thereof;
"The Soda No. 58 Placer Mining Claim," at page 159 thereof;
"The Soda No. 59 Placer Mining Claim," at page 160 thereof;
"The Soda No. 60 Placer Mining Claim," at page 160 thereof;
"The Soda No. 61 Placer Mining Claim," at page 161 thereof;

"The Soda No. 62 Placer Mining Claim," at page 161 thereof;
"The Soda No. 63 Placer Mining Claim," at page 162 thereof;
"The Soda No. 64 Placer Mining Claim," at page 162 thereof;

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"The Soda No. 65 Placer Mining Claim," at page 163 thereof;
"The Soda No. 66 Placer Mining Claim," at page 163 thereof;
"The Soda No. 67 Placer Mining Claim," at page 164 thereof;
"The Soda No. 68 Placer Mining Claim," at page 164 thereof;
"The Soda No. 69 Placer Mining Claim," at page 165 thereof;
"The Soda No. 70 Placer Mining Claim," at page 165 thereof;
"The Soda No. 71 Placer Mining Claim," at page 166 thereof;
"The Soda No. 72 Placer Mining Claim," at page 166 thereof;
"The Soda No. 73 Placer Mining Claim," at page 167 thereof;
"The Soda No. 74 Placer Mining Claim," at page 167 thereof;
"The Soda No. 75 Placer Mining Claim," at page 168 thereof;
"The Soda No. 76 Placer Mining Claim," at page 168 thereof;
"The Soda No. 77 Placer Mining Claim," at page 169 thereof;
"The Soda No. 78 Placer Mining Claim," at page 169 thereof;
"The Soda No. 79 Placer Mining Claim," at page 170 thereof;
"The Soda No. 80 Placer Mining Claim," at page 170 thereof;
"The Soda No. 81 Placer Mining Claim," at page 171 thereof;
"The Soda No. 82 Placer Mining Claim," at page 171 thereof;
"The Soda No. 83 Placer Mining Claim," at page 172 thereof;
"The Soda No. 84 Placer Mining Claim," at page 172 thereof;
"The Soda No. 85 Placer Mining Claim," at page 173 thereof;
"The Soda No. 86 Placer Mining Claim," at page 173 thereof;
"The Soda No. 87 Placer Mining Claim," at page 174 thereof;
"The Soda No. 88 Placer Mining Claim," at page 174 thereof;
"The Soda No. 89 Placer Mining Claim," at page 175 thereof;
"The Soda No. 90 Placer Mining Claim," at page 175 thereof;
"The Soda No. 91 Placer Mining Claim," at page 176 thereof;
"The Soda No. 92 Placer Mining Claim," at page 176 thereof;
"The Soda No. 93 Placer Mining Claim," at page 177 thereof;
"The Soda No. 94 Placer Mining Claim," at page 177 thereof;
"The Soda No. 95 Placer Mining Claim," at page 178 thereof;
"The Soda No. 96 Placer Mining Claim," at page 178 thereof;

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"The Soda No. 97 Placer Mining Claim," at page 179 thereof;
"The Soda No. 98 Placer Mining Claim," at page 179 thereof;
"The Soda No. 99 Placer Mining Claim," at page 180 thereof;
"The Soda No. 100 Placer Mining Claim," at page 180 thereof;
"The Soda No. 101 Placer Mining Claim," at page 181 thereof;
"The Soda No. 102 Placer Mining Claim," at page 181 thereof;
"The Soda No. 103 Placer Mining Claim," at page 182 thereof;
"The Soda No. 104 Placer Mining Claim," at page 182 thereof;
"The Soda No. 105 Placer Mining Claim," at page 183 thereof;
"The Soda No. 106 Placer Mining Claim," at page 183 thereof;
"The Soda No. 107 Placer Mining Claim," at page 184 thereof;
"The Soda No. 108 Placer Mining Claim," at page 184 thereof;
"The Soda No. 109 Placer Mining Claim," at page 185 thereof;
"The Soda No. 110 Placer Mining Claim," at page 185 thereof;
"The Soda No. 111 Placer Mining Claim," at page 186 thereof;
"The Soda No. 112 Placer Mining Claim," at page 186 thereof;
"The Soda No. 113 Placer Mining Claim," at page 187 thereof;
"The Soda No. 114 Placer Mining Claim," at page 187 thereof;
"The Soda No. 115 Placer Mining Claim," at page 188 thereof;
"The Soda No. 116 Placer Mining Claim," at page 188 thereof;
"The Soda No. 117 Placer Mining Claim," at page 189 thereof;
"The Soda No. 118 Placer Mining Claim," at page 189 thereof;
"The Soda No. 119 Placer Mining Claim," at page 190 thereof;
"The Soda No. 120 Placer Mining Claim," at page 190 thereof;
"The Soda No. 121 Placer Mining Claim," at page 191 thereof;
"The Soda No. 122 Placer Mining Claim," at page 191 thereof;
"The Soda No. 123 Placer Mining Claim," at page 192 thereof;
"The Soda No. 124 Placer Mining Claim," at page 192 thereof;
"The Soda No. 125 Placer Mining Claim," at page 193 thereof;
"The Soda No. 126 Placer Mining Claim," at page 193 thereof;
"The Soda No. 127 Placer Mining Claim," at page 194 thereof;
"The Soda No. 128 Placer Mining Claim," at page 194 thereof;

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"The Soda No. 129 Placer Mining Claim," at page 195 thereof;
"The Soda No. 130 Placer Mining Claim," at page 195 thereof;
"The Soda No. 131 Placer Mining Claim," at page 196 thereof;
"The Soda No. 132 Placer Mining Claim," at page 196 thereof;

"The Soda No. 133 Placer Mining Claim," at page 197 thereof;
"The Soda No. 134 Placer Mining Claim," at page 197 thereof;
"The Soda No. 135 Placer Mining Claim," at page 198 thereof;
"The Soda No. 136 Placer Mining Claim," at page 198 thereof;
"The Soda No. 137 Placer Mining Claim," at page 199 thereof;
"The Soda No. 138 Placer Mining Claim," at page 199 thereof;
"The Soda No. 139 Placer Mining Claim," at page 200 thereof;
"The Soda No. 140 Placer Mining Claim," at page 200 thereof;
"The Soda No. 141 Placer Mining Claim," at page 201 thereof;
"The Soda No. 142 Placer Mining Claim," at page 201 thereof;
"The Soda No. 143 Placer Mining Claim," at page 202 thereof;
"The Soda No. 144 Placer Mining Claim," at page 202 thereof;
"The Soda No. 145 Placer Mining Claim," at page 203 thereof;
"The Soda No. 146 Placer Mining Claim," at page 203 thereof;
"The Soda No. 147 Placer Mining Claim," at page 204 thereof;
"The Soda No. 148 Placer Mining Claim," at page 204 thereof;
"The Soda No. 149 Placer Mining Claim," at page 205 thereof;
"The Soda No. 150 Placer Mining Claim," at page 205 thereof;
"The Soda No. 151 Placer Mining Claim," at page 206 thereof;
"The Soda No. 152 Placer Mining Claim," at page 206 thereof;
"The Soda No. 196 Placer Mining Claim," at page 207 thereof;
"The Soda No. 197 Placer Mining Claim," at page 207 thereof;
"The Soda No. 198 Placer Mining Claim," at page 208 thereof;
"The Soda No. 199 Placer Mining Claim," at page 208 thereof;
"The Soda No. 200 Placer Mining Claim," at page 209 thereof;
"The Soda No. 201 Placer Mining Claim," at page 209 thereof;
"The Soda No. 202 Placer Mining Claim," at page 210 thereof;
"The Soda No. 203 Placer Mining Claim," at page 210 thereof;

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"The Soda No. 204 Placer Mining Claim," at page 211 thereof;
"The Soda No. 205 Placer Mining Claim," at page 211 thereof;
"The Soda No. 206 Placer Mining Claim," at page 212 thereof;
"The Soda No. 207 Placer Mining Claim," at page 212 thereof;
"The Soda No. 208 Placer Mining Claim," at page 213 thereof;
"The Soda No. 209 Placer Mining Claim," at page 213 thereof;
"The Soda No. 210 Placer Mining Claim," at page 214 thereof;

"The Soda No. 211 Placer Mining Claim," at page 214 thereof;
"The Soda No. 212 Placer Mining Claim," at page 215 thereof;
"The Soda No. 213 Placer Mining Claim," at page 215 thereof;
"The Soda No. 214 Placer Mining Claim," at page 216 thereof;
"The Soda No. 215 Placer Mining Claim," at page 216 thereof;
"The Soda No. 216 Placer Mining Claim," at page 217 thereof;
"The Soda No. 217 Placer Mining Claim," at page 217 thereof;
"The Soda No. 218 Placer Mining Claim," at page 218 thereof.

Dated this 24th day of November, 1914.

BENJAMIN F. BLEDSOE,
Judge. [49]

[Indorsed]: No. B. 46-Eq. U. S. District Court,
Southern District California, Southern Division.
In Equity. E. Thompson, vs. Thomas W. Pack,
Stella Schuler, Joseph K. Hutchinson. Restraining
Order and Order to Show Cause. Filed Nov. 24,
1914. Wm. M. Van Dyke, Clerk. By R. S. Zim-
merman, Deputy Clerk. H. L. Clayberg, Clayberg
& Whitmore, 937 Pacific Building, San Francisco,
Attorneys for Complainant, Eq. O. Bk. [50]

[Order Continuing Hearing to December 8, 1914.]

At a stated term, to wit, the July Term, A. D. 1914,
of the District Court of the United States of
America, in and for the Southern District of
California, Southern Division, held at the court-
room thereof, in the city of Los Angeles, on
Monday, the seventh day of December, in the
year of our Lord, one thousand nine hundred
and fourteen. Present: The Honorable BEN-
JAMIN F. BLEDSOE, District Judge.

No. B. 46—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause coming on this day to be heard under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction pendente lite should not be issued herein, pursuant to the prayer of the bill of complaint; A. V. Andrews, Esq., appearing as counsel for complainant; Charles W. Slack, Esq., appearing as counsel for defendants; it is ordered that this cause be, and the same hereby is continued until Tuesday, the 8th day of December, 1914, at 10:30 o'clock A. M., for said hearing. [51]

[Order Submitting Application for Preliminary Injunction.]

At a stated term, to wit, the July term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Tuesday, the eighth day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present. The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 46—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause coming on this day to be heard under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction pendente lite should not be issued herein, pursuant, to the prayer of the bill of complaint; A. V. Andrews, Esq., appearing as counsel for complainant; Charles W. Slack, Esq., appearing as counsel for defendants; and the application for a preliminary injunction having been argued, in opposition thereto, by Charles W. Slack, Esq., of counsel for defendants; and court, at the hour of 12:37 o'clock P. M., having taken a recess until the hour of 2 o'clock P. M. of this day;

And now, at the hour of 2 o'clock P. M., court having reconvened, and counsel being present as before, and the application for a preliminary injunction having been further argued, in opposition thereto, by Charles W. Slack, Esq., of counsel for defendants, and in support thereof, by A. V. Andrews, Esq., of counsel for complainant; it is ordered that this cause be, and the same hereby is submitted to the court for its consideration and decision on said application for preliminary injunction and the argument thereof. [52]

[Order Granting Application for Injunction
Pendente Lite, etc.]

At a stated term, to wit, the July Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Friday, the eleventh day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present. The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 46—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause having heretofore been submitted to the court for its consideration and decision under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction *pendente lite* should not be issued herein, pursuant to the prayer of the bill of complaint; the Court having duly considered the same, and being fully advised in the premises, and its opinion having been filed in open court; it is ordered that complainant's application for said temporary injunction be, and the same hereby is granted, counsel for complainant to prepare and present a suitable order in accordance here-with. [53]

[Opinion.]

*In the District Court of the United States, in and for
the Southern District of California.*

C. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,
Defendants.

This matter is before the Court on an order to show cause why a temporary injunction *pendente lite* should not issue restraining the defendants from putting of record certain Notices of Forfeiture with Affidavits of Service thereof; such notices being those provided in Section 2324 Revised Statutes of the United States, and Section 1426-o of the Civil Code of the State of California, with reference to forfeiting of part interests of mining claims.

The bill in equity as filed contains much matter that seems to be immaterial, much that is purely "epithetic," to use an expressive phrase, and a great deal averred upon information and belief and not positively. With respect to this latter the Court feels that it should not, of course, consider it upon this order to show cause, because of the fact that under the law the complainant, to be entitled to positive relief at this juncture, and in advance of a hearing, must base his request for such relief upon positive allegations. Laying out of consideration, however, the matters referred to above, it may be

said, that certain facts are stated with such positiveness and cogency as that they fall within the realm of indispute upon this hearing. Briefly summarized, they are: That the plaintiff in the year nineteen hundred and ten, in conjunction with the defendant Pack, [54] and certain other individuals mentioned, located and recorded one hundred and seventy-five certain placer mining claims, situate in the County of San Bernardino, State of California; That plaintiff is now, and ever since the day of said location has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims, and each of them; that during the month of September, in the year nineteen hundred and fourteen, the defendant herein, caused to be served upon plaintiff a certain notice of forfeiture, set out in the bill of complaint, and by which it was sought, pursuant to the sections of the Revised Statutes and Civil Code above referred to, to forfeit the title of plaintiff in and to each and all of the one hundred seventy-five (175) described placer mining claims heretofore referred to; that said notice contained the appropriate statements that unless plaintiff, within ninety days after the service of the same upon him, paid to the defendants or to the defendant Joseph K. Hutchinson for said defendants, the sum of seven hundred dollars (\$700), claimed to be one-eighth of the total amount of money claimed to have been expended by said defendant Pack, upon said claims, in the years nineteen hundred and eleven (1911) and nineteen hundred twelve (1912), that the interest of plaintiff would become forfeited to the

said Joseph K. Hutchinson. Plaintiff then alleges that the said Pack did not expend, or cause to be expended of his own money, during the years nineteen hundred and eleven (1911) and nineteen hundred and twelve (1912) or at any other time the sum of fifty-six hundred dollars (\$5600), of which the said seven hundred dollars (\$700) was the one-eighth part, upon or for, the benefit of said placer mining claims, or at all; that at least twenty-eight hundred and thirty-six (\$2836) was contributed by plaintiff and his colocators to the defendant Pack, for the purpose of doing the assessment work upon the claims mentioned, for the years nineteen [55] hundred and eleven (1911) and nineteen hundred and twelve (1912). Plaintiff further alleges that whatever title or interest the said Hutchinson obtained or holds in and to the said claims was obtained and is held for the sole use and benefit of the Foreign Mines and Development Company, and the American Trona Company and the California Trona Company. It is also alleged that in the year nineteen hundred and twelve (1912) while plaintiff and his colocators were engaged in the performance of the annual assessment work upon said claims they were forcibly prevented from completing the said assessment work, and were forcibly ejected and driven from said claims, by the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company.

If these facts thus alleged be true, and at this time the Court must assume them to be true, because no affidavit or answer in opposition to or in explanation

of them has been presented by the defendants, then it would appear that the defendants have no right to claim or exact a forfeiture, as against the plaintiff, for his failure to contribute his share of the assessment work, and that the proceedings on the part of defendants, leading up to the service of the notice of forfeiture, and in the recording thereof, are substantially a nullity, in so far as they seem to have effected a divestiture of plaintiff's undivided interest in and to the mining property in question. On such a state of facts I apprehend the Court, after an accounting or other appropriate investigation, would make a decree determinative of the rights of the parties and the protection thereof. This decree, under the case as made by the facts to be taken as true would in its substantial aspects be in favor of the plaintiff. The only question for determination then, is whether or not the plaintiff should be protected in his rights, pending such final determination by the Court, and whether or [56] not the strong arm of the Court should be employed at this time to enjoin the defendants from placing of record, that which plaintiff claims would constitute a cloud upon his title, to wit: The notice of forfeiture with the affidavit of service thereof. That it would constitute such a cloud, I think, is indisputably clear. It was held in Pixley vs. Huggins; 15 Cal. 128, that the true test as to whether or not a certain instrument would cast a cloud upon the title, upon the plaintiff's property, was this: "Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed be re-

quired to offer evidence to defend a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary no shade would be cast by the presence of the deed." This decision has been cited frequently and I apprehend states the law concisely. In this case it is apparent that the filing of the notice and affidavit of service, would *prima facie* serve to divest plaintiff of his interest in the properties and that it would require extrinsic evidence on his part to defeat a suit of ejectment, based upon the forfeiture apparently evidenced by the notice of labor done and failure to contribute thereto. For these reasons I am constrained to hold that plaintiff has presented a *prima facie* case, free from colorable doubt, is entitled to a temporary injunction *pendente lite*.

Plaintiff's counsel will draft an appropriate order.

BENJAMIN F. BLEDSOE,
Judge.

[Endorsed]: No. B. 46—Equity. United States District Court Southern District of California, Southern Division. C. Thompson vs. Thomas W. Pack et al. Opinion Re Injunction Pendente Lite. Filed December 11, 1914, Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [57]

[Order for Injunction Pendente Lite.]

District Court of the United States, Southern District of California.

No. B. 46—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

On the return of the order to show cause made by me in the above-entitled action on the 24th day of November, 1914, and returnable on the 7th day of December, 1914, and this cause coming on regularly for hearing on the return day thereof, upon the verified bill of complaint. After hearing Messrs. Clayberg & Whitmore for the complainants and Messrs. Charles W. Slack and Joseph K. Hutchinson, for the defendants, and no sufficient cause to the contrary being shown;

IT IS ORDERED that the said order to show cause be, and the same hereby is made absolute until the final determination of this suit. It is further ORDERED, that you, the said defendants, Thos. W. Pack, Stella Schuler and Joseph K. Hutchinson, and each of you, your and each of your attorneys, agents, servants and employees, are hereby specially restrained and enjoined from in any way or manner taking any steps towards forfeiting or declaring a forfeiture of plaintiff's right, title and interest in

and to those certain placer mining claims named and described in the Bill of Complaint filed herein and each of them, pursuant to or in accordance with your pretended Notice of Forfeiture heretofore, and within ninety days prior to the date of the commencement of this suit served upon plaintiff herein, until the final hearing and termination of this suit, or until the further [58] order of this Court.

The Clerk will issue the Writs accordingly.

Dated this 15th day of December, 1914.

BENJAMIN F. BLEDSOE,
Judge of Said District Court.

[Endorsed]: No. B. 46—Equity. In the District Court of the United States in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack, et al., Defendants. Order for Injunction Pendente Lite. Filed Dec. 15, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Clayberg & Whitmore, Attorneys for Dfts. [59]

*In the District Court of the United States, in and for
the Southern District of California.*

No. B. 46—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Assignment of Error.

Now come Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, defendants above named, and make and file this their assignment of error:

I.

That the District Court of the United States, in and for the Southern District of California, erred in giving, making and entering its order of the 11th day of December, 1914, granting the application of the above-named complainant for a temporary injunction *pendente lite* in the above-entitled proceeding.

II.

That the District Court of the United States, in and for the Southern District of California, erred in giving, making and entering its order of the 11th day of December, 1914, wherein and whereby it ordered that a temporary injunction *pendente lite* be issued in the above-entitled proceeding, restraining the defendants in the above-entitled proceeding, and each of them, from filing affidavits of the service of the notice of [60] forfeiture in the complaint on file in the above-entitled proceeding and in said temporary injunction *pendente lite* referred to and described.

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,

JOSEPH K. HUTCHINSON,

Solicitors for Defendants.

[Endorsed]: No. B. 46—Equity. In the United States District Court, in and for the Southern Dis-

trict of California, Southern Division. E Thompson, Complainant, vs. Thomas W. Pack, et al., Defendants. Assignment of Error, (Order of Dec. 11, 1914). Original. Filed Dec. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. [61]

*In the District Court of the United States, in and for
the Southern District of California.*

No. B. 46—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Petition for an Order Allowing an Appeal.

The above-named defendants, Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, conceiving themselves aggrieved by the order entered on the 11th day of December, 1914, in the above-entitled proceeding, which said order granted the above-named complainant's application for a temporary injunction *pendente lite*, do, and each of them does, hereby appeal from said order to the United States Circuit Court of Appeals, for the Ninth Circuit, and they pray, and each of them prays, that this, their appeal, may be allowed; and that a transcript of the

record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals, for the Ninth Circuit.

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,

JOSEPH K. HUTCHINSON,

Solicitors for Defendants.

And now, to wit, on December 24th, 1914, it is ORDERED that the foregoing appeal be allowed as prayed for, [62] upon giving bond in sum of \$250.00 for costs on appeal.

BENJAMIN F. BLEDSOE,

District Judge.

[Endorsed]: No. B. 46—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Petition for and Order Allowing Appeal. (Order of Dec. 11, 1914.) Filed Dec. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. [63]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B.46—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That United States Fidelity & Guaranty Company,
a corporation, duly incorporated under and by virtue
of the laws of the State of Maryland and authorized
by its charter and by law to become sole surety on
bonds and undertakings, is held and firmly bound
unto E. Thompson in the full and just sum of Two
Hundred Fifty Dollars (\$250.00), lawful money of
the United States, to be paid to the said E. Thompson,
her executors, administrators or assigns; to
which payment the said United States Fidelity &
Guaranty Company binds itself by these presents.

IN WITNESS WHEREOF, the United States
Fidelity & Guaranty Company has caused these pre-
sents to be executed by its duly authorized attorney
in fact and has caused these presents to be sealed
with the seal of the United States Fidelity &
Guaranty Company on this 24th day of December, in the

year of our Lord one thousand nine hundred and fourteen.

WHEREAS, lately, at a District Court of the United States, for the Southern District of California, Southern Division, in a suit depending in said Court between E. Thompson as [64] complainant and Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson as defendants, an order was entered on the 11th day of December, 1914, in the above-entitled proceeding, which said order granted the above-named complainant application for a temporary injunction *pendente lite*. And the said Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, having obtained from said court an order allowing an appeal to reverse the said order in the aforesaid suit, and a citation directed to the said E. Thompson citing and admonishing her to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, to wit, within thirty days after the 24th day of December, 1914.

Now, the condition of the above obligation is such that if the said Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue;

[Seal] UNITED STATES FIDELITY &
 GUARANTY COMPANY,
 By VAN R. KELSEY,
 Its Attorney in Fact.

State of California,
County of Los Angeles,—ss.

On this 24th day of December, in the year one thousand nine hundred and fourteen, before me, Hallie D. Winebrenner, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Van R. Kelsey, known to me to be the duly authorized Attorney in fact of The United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the Attorney in fact of said company, and the said Van R. Kelsey duly acknowledged to me that he subscribed the name of The United States Fidelity [65] and Guaranty Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] HALLIE D. WINEBRENNER,
Notary Public in and for Los Angeles County, State
of California.

(Cancelled Internal Revenue Stamps, $2\frac{1}{2}\text{¢}$.)

Premium on bond—500.

[Endorsed]: No. B. 46—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Undertaking on Appeal. Filed December 25, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. The form of undertaking and

sufficiency of surety approved. Benjamin F. Bledsoe, Judge. 12/25/14. Macomber & Pendleton, Attorneys, 915 Black Building, Los Angeles, Cal. A-2929. Main 5464. [66]

*In the District Court of the United States, in and for
the Southern District of California.*

No. B. 46—EQUITY.

E. THOMPSON.

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Praecipe for Record on Appeal.

To the Clerk of the District Court of the United States, in and for the Southern District of California, Southern Division:

SIR: You are hereby instructed to prepare a certified copy of the record in the above-entitled proceeding for use upon an appeal from the order heretofore given, made and entered in the above-entitled proceeding on the 11th day of December, 1914, granting the application of the above-named complainant for a temporary injunction *pendente lite* and ordering said injunction *pendente lite* to issue; said record will be made up of the following papers, records and proceedings in said above-entitled proceeding;

The bill of complaint therein;

The temporary restraining order and order to

show cause given and made therein on the 24th day of November, 1914;

The minute order made in the above-entitled proceeding upon the return of said order to show cause on the 7th day of December, 1914, showing the making of a motion *ore tenus* on behalf of the defendants in the above-entitled proceeding to [67] dissolve said temporary restraining order, and submitting said application for an injunction *pendente lite* and said motion;

The minute order in the above-entitled proceeding given, made and entered upon the 11th day of December, 1914, granting the said complainant's application for an injunction *pendente lite*;

The opinion of the above-entitled Court in the above-entitled proceeding given upon the making of the order granting said application for an injunction *pendente lite* and filed in the above-entitled proceeding on the 11th day of December, 1914;

The order given, made and entered in said proceeding on the 11th day of December, 1914, which said order restrained and enjoined defendants above named from doing certain acts in said order and in the bill of complaint in the above-entitled proceeding more particularly set out and described, and ordered that an injunction *pendente lite* issue in the above-entitled proceeding;

The injunction *pendente lite* issued pursuant to said order of December 11, 1914, which said injunction was issued and is dated the 15th day of December, 1914;

The assignment of error of the above-named defendants filed with their petition for an order allowing the appeal above specified and referred to:

You will forthwith make up your certified copy of the foregoing papers and transmit the same, with the original petition for an order allowing an appeal and the citation issued thereon, with the return of the service of said citation, to the Clerk of the United States Circuit Court of Appeals, for [68] the Ninth Circuit, at San Francisco, California.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,

Solicitors for Defendants.

San Francisco, Cal., December 23d, 1914.

Service of the Within Praeclipe for Record on Appeal this 23d day of December, 1914, is hereby admitted.

H. L. CLAYBERG,
CLAYBERG & WHITMORE,
Attorneys for Complainant.

[Endorsed]: No. B. 46—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Praeclipe for Record upon Appeal. (Order of Dec. 11, 1914.) Original. Filed Dec. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal.
[69]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. B. 46—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER, and JOSEPH K. HUTCHINSON,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing sixty-nine (69) typewritten pages, numbered from 1 to 69, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the bill of complaint, temporary restraining order and order to show cause given and made on the 24th of November, 1914, minute orders of the 7th, 8th and 11th days of December, 1914, respectively, opinion of the court given upon the making of the order granting application for injunction *pendente lite*, order of December 15, 1914, granting injunction *pendente lite*, assignment of error, petition for and order allowing appeal, undertaking on appeal, and praecipe for transcript of record on appeal in the above and therein entitled action; and I do further certify that the above constitute the record on appeal

in said action as specified in the said praecipe for transcript of record on appeal, filed on behalf of the appellants in said action.

I do further certify that the cost of said transcript [70] is \$40.90, the amount whereof has been paid me by Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, the appellants in said action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 30th day of December, in the year of our Lord, one thousand nine hundred and fourteen, and of our Independence the one hundred and thirty-ninth.

[Seal] WM. M. VAN DYKE,
Clerk of the District Court of the United States of
America, in and for the Southern District of
California.

[Ten Cents Internal Revenue Stamp. Canceled
Dec. 30, 1914. Wm. M. Van Dyke.] [71]

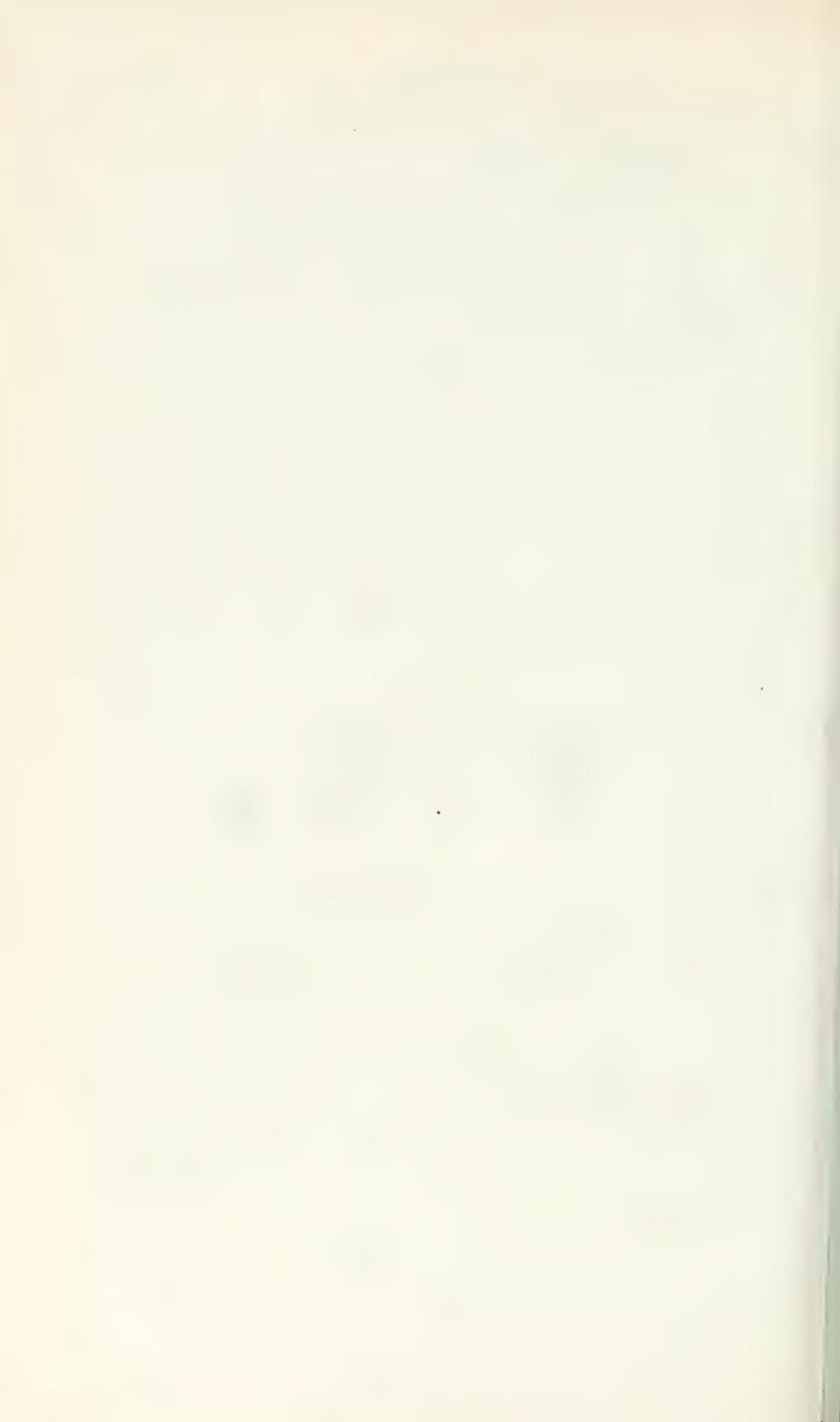
[Endorsed]: No. 2535. United States Circuit Court of Appeals for the Ninth Circuit. Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, Appellants, vs. E. Thompson, Appellee. Transcript of Record. Upon Appeal from the United States

District Court for the Southern District of California, Southern Division.

Filed December 31, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



Nos. 2535, 2536, 2537

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

THOMAS W. PACK, STELLA SCHULER
and JOSEPH K. HUTCHINSON,
Appellants,

vs.

E. THOMPSON,
Appellee.

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal From the United States District Court for the Southern
District of California, Southern Division.

CHARLES W. SLACK,
Alaska Commercial Building, San Francisco,
JOSEPH K. HUTCHINSON,
First National Bank Building, San Francisco,
Solicitors for Appellants.

Filed this day of January, 1915.

Filed FRANK D. MONCKTON, Clerk.

By JAN 25 1915 Deputy Clerk.

F. D. Monckton,

Nos. 2535, 2536, 2537

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

THOMAS W. PACK, STELLA SCHULER
and JOSEPH K. HUTCHINSON,

Appellants,

vs.

E. THOMPSON,

Appellee.

BRIEF ON BEHALF OF APPELLANTS

Upon Appeal From the United States District Court for the Southern
District of California, Southern Division.

Statement of the Case.

There are three cases before this court each of which is on appeal from an order granting an injunction pendente lite, in which the above-named parties are respectively appellants and appellee. The facts presented in each of the three appeals are substantially the same. The same similarity applies to the questions presented by the appeals. For the sake of brevity and to avoid confusion, appellants embody herein a statement of facts taken from the bill on file in Case No. 2537, and a discussion of

authorities which will be of general application to all appeals. The few particulars in which the respective records on the three appeals differ will be appropriately noted.

Three bills in equity of complainant and appellee were filed in the District Court on November 24th, 1914. (Tr., p. 35.) The allegations that are common to each of the bills, and upon which temporary restraining orders and injunctions pendente lite were sought, are as follows:

1. That in 1910 complainant jointly with seven others, one Fursman, one Huff, one Baker, one Waymire, one Perkins, one Smith, and the defendant Pack, located certain placer mining claims on Searles Borax Lake in San Bernardino County, California.* (Tr., p. 4.)

2. That complainant is now, and ever since the date of the locations has been, owner of an undivided one-eighth interest in said claims. (Tr., p. 4.)

3. That neither complainant nor the said defendants, or either of them, are now, nor for a long time prior to the commencement of this suit, have they, or either of them, been in the actual possession of the said claims. (Tr., p. 4.)

4. That in September, 1914, defendants caused to be served on complainant a Notice of Forfeiture, a copy of which is attached to the bill of complaint as "Exhibit A", (Tr., p. 6) drawn pursuant to Sec-

* In case No. 2535 the number of claims is placed at 175; in case No. 2536 at 12; and in case No. 2537 at 44.

tion 2324 U. S. R. S. By the terms of the Notice of Forfeiture attached to the bill of complaint in case No. 2537 notice is given to the complainant that the defendant Pack expended during the year 1912 the sum of \$4400, in amounts of \$100, for labor and improvements, upon each of the 44 claims described in the bill of complaint; that said \$4400 was expended by said Pack for the purpose of complying with the requirements of Section 2324, U. S. R. S., concerning the performance of annual labor upon mining claims;* that throughout the year 1912 said Pack was the owner of an undivided one-eighth interest in said claims, and that subsequent to the making of said expenditures, transferred his one-eighth interest to the defendant Schuler, who, in turn, subsequently transferred said interest to the defendant Hutchinson, who is now the owner thereof. That after demand made in said Notice of Forfeiture upon complainant for contributive payment of complainant's proportion of said sum expended by defendant Pack, to wit: The sum of \$550 or one-eighth of said expenditures, further notice is given to the complainant that failure to contribute said sum of \$550 within ninety days of the personal service of the Notice upon the complainant, will result in complainant's interest in said mining claims becoming vested in the parties signing said

*In case No. 2535 the number of claims is placed at 175; the amount expended at \$5600; the amount contribution of which is asked at \$700, and the years for which expended as 1911 and 1912; in case No. 2536 the number of claims at 12, the amount at \$1200; the amount to be contributed at \$150, and year as 1911. These differences occur throughout the bills.

Notice. The Notice is signed by each of the defendants. (Tr., pp. 31-35.)

5. That defendant Pack did not expend in 1912, or during any other year, or at any other time, or at all, \$4400, or any other sum, of his own money or funds upon said claims for labor and improvements, or for any purpose whatsoever. (Tr., p. 7.)

6. That said Pack did not expend in 1912, or during any other year, \$100 of his own money or funds upon each or any of said claims for labor and improvements, or for any purpose whatsoever. (Tr., p. 7.)

7. That said Notice of Forfeiture does not describe the kind, character, or nature of the labor and improvements claimed to have been performed upon said claims during 1912. (Tr., p. 8.)

8. That complainant is unable to ascertain from said Notice of Forfeiture whether—

(a) Pack claimed to have actually expended of his own money or funds in labor and improvements \$100 upon each of said claims; or—

(b) Whether he expended \$5600 on all of them; or—

(c) Whether he claims to have expended such money in the transportation of men and supplies to Searles Borax Lake for the purpose of having done upon said claims the annual representation work for 1912. (Tr., p. 8.)

9. That complainant cannot ascertain from said Notice of Forfeiture whether—

(a) The amount claimed to have been expended by said Pack of his own money or funds upon said claims, if he ever expended any money at all thereon, was of the value of \$100 for each claim; or—

(b) Whether of the value of \$4400 for all the claims; or—

(c) Whether such labor and improvements increased the value of each of said claims \$100; or—

(d) Whether they increased the value of them all \$4400; or—

(e) Whether such labor and improvements tended in any way to develop said claims. (Tr., pp. 8-9.)

10. On information and belief that defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said claims for 1912, expended a greater portion or all of such money in—

(a) The transportation of men and supplies to said claims; and—

(b) In furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported to said claims for the purpose of performing said work during said year. (Tr., p. 9.)

11. That said Notice is executed, made and signed by defendants Pack, Schuler and Hutchinson. (Tr., p. 9.)

12. That said Notice discloses on its face—

(a) That neither the defendant Schuler nor Hutchinson had any interest in said claims in 1911 and 1912, or during the time it is claimed that defendant Pack expended money on said claims; and—

(b) That neither the defendant Schuler nor Hutchinson ever expended any of the money named in the Notice of Forfeiture. (Tr., p. 9.)

13. That on or about December 25th, 1913, defendant Schuler made, executed, acknowledged and delivered her deed and conveyance to one Shellito, whereby said defendant Schuler conveyed to Shellito all her right in said claims. (Tr., p. 10.)

14. That on or about January 14th, 1914, defendant Schuler assumed to convey to defendant Hutchinson the same interest that she had theretofore conveyed to said Shellito. (Tr., p. 10.)

15. That said defendant Hutchinson at the time of receiving such conveyance, was fully informed and had full knowledge that said defendant Schuler had conveyed all right described therein to said Shellito, prior to the execution of the said conveyance from Schuler to Hutchinson. (Tr., p. 10.)

16. That defendant Hutchinson took said conveyance from defendant Schuler—

(a) For the sole and only use and benefit of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, or for all or a part of them; and—

(b) Not for his own use and benefit; and—

(c) In pursuance of a combination and conspiracy by and between these defendants and the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, wherein and whereby the said defendants and the said corporations confederated and combined together to injure complainant and to deprive and defraud him of all his right in said claims. (Tr., pp. 10-11.)

17. On information and belief that the pretended transfer of the one-eighth interest in said claims by defendant Schuler to defendant Hutchinson, if such transfer was made at all, was made pursuant to and in order to carry out a combination and conspiracy to injure complainant and to deprive and defraud him of all his right in said claims. (Tr., p. 11.)

18. That said pretended transfer to defendant Hutchinson by defendant Schuler was made and done, if made and done at all, wholly and totally without a valuable or other consideration. (Tr., p. 11.)

19. That, if any consideration at all was paid by defendant Hutchinson to defendant Schuler for said transfer, the same was advanced and paid—

(a) By the Foreign Mines and Development Company, or by the American Trona Company, or by the California Trona Company, or by part or all of them, or—

(b) By some person or persons authorized by them, or part or all of them, or acting for them, or for part or all of them, and on their behalf, or on the behalf of part or all of them.

(Tr., p. 11.)

20. That defendant Hutchinson took the title to said one-eighth interest, if he took the title at all—

(a) For the sole benefit and use of the said Foreign Mines and Development Company, or the American Trona Company, or the California Trona Company, or for part or all of them, and—

(b) Not for his own use and benefit. (Tr., pp. 11-12.)

21. That defendant Hutchinson now claims to hold said title to said one-eighth interest in said claims, if such title ever passed to him,—

(a) For the sole and only use and benefit of the said Foreign Mines and Development Company, the said American Trona Company, the said California Trona Company, or for the sole use and benefit of part or all of them, and—

(b) Not for his own use and benefit. (Tr., p. 12.)

22. That said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, claim rights and interests in said mineral lands, covered by said placer locations so made and recorded by complainant and others. (Tr., p. 12.)

23. That said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company have for some years last past been endeavoring to defeat the locations so made by complainant and others. (Tr., p. 12.)

24. That said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company have, and each and every of them has, as complainant is informed and believes, fraudulently attempted to procure the right of defendant Pack in said locations so made by complainant and others, for the express purpose, and for none other, of—

(a) Using said interest of defendant Pack in said locations in such a way and manner as to destroy all of complainant's right therein, and—

(b) To defraud complainant out of all interest in said claims. (Tr., pp. 12-13.)

25. On like information and belief that defendant Hutchinson has been acting as agent, representative and attorney of said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and each

of them, in endeavoring to deprive and defraud complainant of his right in said locations. (Tr., p. 13.)

26. That defendant Hutchinson, under the direction and orders of said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and each of them, fraudulently obtained said transfer of said one-eighth interest in said claims, if he obtained said transfer at all, from defendant Schuler, in pursuance to the combination and conspiracy entered into and carried on by and between said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, and each of them, and the said defendants, and each of them, to injure complainant and defraud and deprive him of all right to said claims. (Tr., p. 13.)

27. That in further pursuance of said combination and conspiracy, and under the orders and direction of said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, or all or part of them, the defendants caused to be served on complainant said Notice of Forfeiture. (Tr., pp. 13-14.)

28. That the fraudulent transfer of said one-eighth interest by defendant Schuler to defendant Hutchinson, if any transfer was made at all, and the serving of said Notice of Forfeiture on complainant, was all done in pursuance to and in the carrying out of a combination and conspiracy

entered into by and between said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, or all or part of them, and said defendants and each of them, confederated together for the purpose of injuring complainant and depriving and defrauding him of all his rights in said claims. (Tr., p. 14.)

29. On information and belief that said Notice of Forfeiture was prepared and served upon complainant pursuant to and in furtherance of such combination and conspiracy between defendants and the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company. (Tr., p. 14.)

30. On information and belief that defendant Pack never, during 1911 and 1912, or at any other time, expended or caused to be expended, the sum of \$1400 of his own funds or money, or any other sum or amount, in and upon said claims or upon one or any of them, for any purpose whatsoever. (Tr., pp. 14-15.)

31. On information and belief, that neither defendant Pack nor any of the defendants, or their co-conspirators, are entitled to any contribution from complainant in any sum whatsoever. (Tr., p. 15.)

32. Complainant is informed and believes that none of the money defendant Pack claims to have expended for representation work, or for labor and improvements, or labor or improvements, on the

claims, or any thereof, if expended by said Pack at all, was expended by him for the annual representation and assessment work upon said claims, or any of them, as required by law. (Tr., p. 15.)

33. That defendant Pack paid the money set forth in said Notice of Forfeiture, if he paid any money at all, for—

(a) Certain goods, wares and merchandise furnished to certain laborers employed by complainant and his co-locators doing assessment work on said claims in the years 1911 and 1912, and for—

(b) Automobile hire in transporting said laborers and supplies to and from said claims. (Tr., p. 15.)

34. That in January, 1913, one Colquhoun, through his attorney, defendant Hutchinson, filed suit against defendant Pack, one Henry E. Lee, and T. O. Toland, in the Superior Court of the State of California in and for the City and County of San Francisco. (Tr., pp. 15-16.)

35. That in the verified complaint said Colquhoun alleges—

(a) That he is assignee of C. J. & E. E. Teagle;

(b) That \$750 is due him for certain goods, wares and merchandise sold and delivered to said Pack and the other defendants in said suit during 1911 and 1912;

(c) That the same had never been paid. (Tr., p. 16.)

36. On information and belief that the said goods sued for in said action were purchased by said Pack from the said Teagles in Johannesburg, Kern County, California. (Tr., p. 16.)

36a. That the whole amount of said goods, wares and merchandise so purchased by defendant Pack from the said Teagles was \$969. (Tr., p. 16.)

37. That the said Teagles in said suit admit that \$219 has been paid on said account. (Tr., p. 16.)

38. On information and belief that said \$750 sued for in said action constitutes part of the amount which the defendants Pack, Schuler and Hutchinson claim in said Notice of Forfeiture to have been paid by defendant Pack in 1911 for doing assessment work on said claims, and for the pretended payment of which defendants are now seeking contributions from complainant, and threatening forfeiture of his right in said claims upon his failure so to contribute, as recited in said Notice of Forfeiture. (Tr., pp. 16-17.)

39. That in February, 1914, judgment was rendered in said suit against defendant Pack, in plaintiff's favor, in the whole amount sued for. (Tr., p. 17.)

40. That said judgment has never been satisfied or discharged, either in whole or in part, or set aside, vacated, or modified. (Tr., p. 17.)

41. That in January, 1913, one Varney, by his attorney, defendant Hutchinson, filed suit against defendant Pack, Henry E. Lee and T. O. Toland,

in the Superior Court of the State of California, in and for the City and County of San Francisco. (Tr., p. 17.)

42. That in the verified complaint said Varney alleged that during 1911 and 1912 he furnished supplies and rendered services to defendant Pack and the other defendants in said suit in the sum of \$4180, of which said sum only \$535 has been paid. (Tr., p. 17.)

43. That in February, 1913, a judgment was entered in said action against said Pack in favor of plaintiff, in the whole amount sued for. (Tr., p. 18.)

44. On information and belief that said judgment in said suit—

- (a) Is still outstanding and of record, and—
- (b) Has never been satisfied, set aside, vacated or modified. (Tr., p. 18.)

45. On information and belief that said action was brought by said Varney to recover \$4180 from defendant Pack, Henry E. Lee and T. O. Toland, for the use of two automobiles and supplies furnished by said Varney to defendant Pack, at his special instance and request, in 1911 and 1912, and used by defendant Pack to transport men hired by complainant and his co-locators to do the annual assessment work on said claims for said years, and supplies for said men, from said City of Los Angeles to said claims. (Tr., p. 18.)

46. On information and belief that said \$4180 sued for in said action constitutes part of the

amount that the defendants claim in their Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from complainant and threatening forfeiture of his right in said claims upon his failure so to contribute, as recited in said Notice of Forfeiture. (Tr., pp. 18-19.)

47. That in September, 1913, said Colquhoun, by his attorneys, defendant Hutchinson and another, filed suit in the Superior Court of the State of California in and for the City and County of San Francisco against this complainant and one Fursman, one Huff, one Perkins, one Baker, one Waymire, one Smith, and defendant Schuler, to recover \$750 alleged to be due said plaintiff for the value of certain goods, wares and merchandise. (Tr., p. 19.)

48. That in his verified complaint in said suit said Colquhoun alleges that the said Teagles assign to him the claim sued on. (Tr., p. 19.)

49. That said Colquhoun further alleges that in 1911 and 1912 the said Teagles furnished certain goods, wares and merchandise to the value of \$750 to the defendants therein, including this complainant. (Tr., p. 19.)

50. That no part of said sum has been paid. (Tr., p. 19.)

51. That said suit was brought by plaintiff for the value of said goods, wares and merchandise

claimed to have been sold and delivered by plaintiff's assignors to defendant Pack in 1911 and 1912, and it is claimed that the same were used by a camp of men doing assessment work on said claims during 1911 and 1912. (Tr., p. 20.)

52. That the whole value of said goods is \$969. (Tr., p. 20.)

53. That said plaintiff in said suit admitted payment of \$219 on account. (Tr., p. 20.)

54. That in February, 1913, said Waymire filed his verified answer to the complaint in said action. (Tr., p. 20.)

55. That thereafter a trial was had of the issues therein. (Tr., p. 20.)

56. That after judgment had been rendered against said Waymire the said court, in August, 1914, granted said Waymire's motion for a new trial thereof. (Tr., p. 20.)

57. That plaintiff in said suit, as this complainant is informed and believes, is now prosecuting an appeal from the order of said court granting said motion for a new trial. (Tr., p. 20.)

58. On information and belief that said sum of \$750 sued for in said action and the sum of \$219 admitted to have been paid on account therein constitute part of the amount defendants in this suit claim in their pretended Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing assessment work on said claims, and for the pretended payment of which said defendants are

now seeking contribution from the complainant, and threaten forfeiture of his right in said claims, upon his failure so to contribute, as recited in said Notice of Forfeiture. (Tr., pp. 20-21.)

59. That in August, 1913, said Varney, by his attorneys, defendant Hutchinson and another, filed suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against complainant and one Fursman, one Huff, one Perkins, one Baker, one Waymire, one Smith, and defendant Schuler. (Tr., p. 21.)

60. That in the verified complaint in said suit said Varney alleged that during 1911 and 1912 he furnished supplies and rendered services to the defendants therein in the sum of \$4170, of which said sum only \$500 has been paid. (Tr., p. 21.)

61. That said action was brought by said Varney to recover the sum of \$3670 from the said defendants for the use of two automobiles and certain supplies furnished by said Varney to defendant Pack at his special instance and request, in 1911 and 1912, and used by defendant Pack to transport men and supplies from the City of Los Angeles and elsewhere to the said placer mining claims. (Tr., pp. 21-22.)

62. That in October, 1913, said Waymire filed his verified answer to the complaint in said action. (Tr., p. 22.)

63. That thereafter various proceedings were had therein. (Tr., p. 22.)

64. That a trial thereof was had before the court. (Tr., p. 22.)

65. That in July, 1914, said Waymire moved the court for a non-suit in said action. (Tr., p. 22.)

66. That the motion for a non-suit was by the court granted. (Tr., p. 22.)

67. That in October, 1914, judgment was entered in favor of said Waymire. (Tr., p. 22.)

68. On information and belief that said \$3670 and said \$500 constitute part of the amount that the defendants in this suit claim in said pretended Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from complainant, and threaten forfeiture of his right in said claims, upon his failure so to contribute, as recited in said Notice. (Tr., pp. 22-23.)

69. That in February, 1914, one Mojica filed an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against complainant and his co-locators and defendant Schuler, as assignee of defendant Pack, one Henry E. Lee, and various other parties, to recover the sum of \$1443.50. (Tr., p. 23.)

70. That in his verified complaint in said action said plaintiff—

(a) Pretends to be the assignee of thirty certain Mexican laborers;

(b) Pretends therein that each of said laborers had assigned to him their claims against the defendants therein for doing certain labor and work on said claims, by way of assessment work thereon, during 1912. (Tr., p. 23.)

71. That said action is now at issue in said Superior Court. (Tr., p. 23.)

72. On information and belief that said sum of \$1443.50 sued for in said action constitutes a portion of the amount defendants in this suit claim in their said pretended Notice of Forfeiture to have been paid by defendant Pack in 1911 and 1912 for doing the assessment work on said claims, and for the pretended payment of which said defendants are now seeking contribution from the complainant, and threaten forfeiture of his right in said claims, upon his failure so to contribute, as recited in said Notice. (Tr., pp. 23-24.)

73. That complainant is informed and believes that no part of said sum of \$1443.50 sued for in said action has been paid by defendant Pack, or any one whomsoever for him. (Tr., p. 24.)

74. That a short time prior to the date when defendant Pack claimed to have expended money for the purpose of doing assessment work on said claims, as claimed in said Notice of Forfeiture, one Henry E. Lee, as the duly authorized agent and representative of complainant, and of his co-locators, paid to defendant Pack for complainant,

and for his said co-locators, in their respective proportionate shares, the sum of \$1000 as a portion of their pro rata contributions for the doing of said annual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and used in said annual assessment work thereon. (Tr., pp. 24-25.)

75. That, as complainant is informed and believes, defendant Pack did so use said sum of \$1000 for said purpose in said year, and that the said amount should be credited to complainant and his co-locators in proportion to their respective interests in said claims. (Tr., p. 25.)

76. That in 1911, and prior to the time any money is claimed to have been expended by defendant Pack in his said Notice of Forfeiture, defendant Pack duly acknowledged in writing that he was indebted to one Henry E. Lee, the duly authorized agent of complainant and his co-locators, in the sum of \$1836. (Tr., p. 25.)

77. That said Henry E. Lee, acting as such agent for complainant and his co-locators, directed defendant Pack to use and utilize all of said money, or so much thereof as might be necessary, in the annual representation of said claims for 1911 and 1912. (Tr., p. 25.)

78. That defendant Pack agreed with said Lee that he would so utilize and use said money. (Tr., p. 25.)

79. That complainant claims that said \$1836 is and should be a portion of the money expended by

defendant Pack, as described in said pretended Notice of Forfeiture. (Tr., p. 25.)

80. That said money and indebtedness was money due and owing to complainant and his co-locators from defendant Pack, duly evidenced by his written acknowledgment of such indebtedness to said Lee, the duly authorized agent of complainant and his co-locators. (Tr., pp. 25-26.)

81. That said amount should be credited to complainant and his co-locators in proportion to their respective interests in their said claims. (Tr., p. 26.)

82. That simultaneously with the service of said Notice of Forfeiture upon complainant, the defendants served upon complainant another pretended Notice of Forfeiture, by which defendants claim that defendant Pack expended in 1911 and 1912, \$5600 for labor and improvements on 175 placer claims among which are included the claims described in this bill.* (Tr., p. 26.)

83. That by the terms of said other pretended Notice of Forfeiture the defendants claim contribution from complainant twice for the same money and twice for the representation of the claims in this bill described.* (Tr., p. 26.)

* In Case No. 2525, instead of the matter above found in 82 and 83 there are the following allegations (references in this note are to transcript in that case):

82. That by the terms of said Notice of Forfeiture it is not disclosed that defendant Pack, or either of the other defendants, ever expended the sum of \$100 on each or any of the said claims. (Tr., p. 30.)

83. That by said Notice of Forfeiture it is claimed by the defendant that \$5600 was expended for annual representation of the 175 claims described in said Notice for 1911 and 1912, while in truth and in

84. Complainant has no means of knowing or ascertaining what, if any, amount of his own money or funds said defendant has expended on said claims, or on any of them, for annual representation work for 1911 and 1912. (Tr., p. 26.)

85. That the only method whereby complainant can procure said information is through this court, and by its order compelling defendant Pack to account for and disclose—

(a) Any and all moneys expended or spent by him on said claims, or on any of them, in

fact the United States Statutes and the Statutes of the State of California require that \$100 in labor or improvements be placed upon each separate claim for each separate year, and that \$35,000 would be required by said statutes to fully represent each and all of said 175 claims for the two years, 1911 and 1912. (Tr., p. 30.)

83a. That it does not appear from said Notice of Forfeiture which particular claim or claims was represented by the defendants, if any were represented at all, either for 1911 or for 1912. (Tr., p. 31.)

83b. That it does not appear from said Notice of Forfeiture how much money, if any, the defendants expended in labor or improvements on any of said claims, either for 1911 or 1912. (Tr., p. 31.)

83c. That it does not appear from said Notice of Forfeiture—

(a) Whether the defendants expended \$100 in labor or improvements on either of said claims either for 1911 or 1912, or—

(b) Whether the improvements on either of said claims were for 1911 or 1912, or—

(c) Whether the \$5600 so claimed to have been expended by defendant Pack was expended on all of said claims, or—

(d) Upon which of said 175 claims, and if so expended, how much of the same was expended upon either or any of said 175 claims. (Tr., p. 31.)

83d. That simultaneously with the service of said Notice of Forfeiture on complainant, said defendants caused to be served on complainant two other and further pretended notices of forfeiture, by one of which defendant Pack, and each and all of said defendants, claimed that defendant Pack had expended \$1200 on twelve of said 175 claims in the annual representation of said claims for 1911. (Tr., pp. 31-32.)

83e. That simultaneously with the service of said Notice of Forfeiture on complainant, said defendants caused to be served on said complainant two other and further pretended notices of forfeiture, by one of which defendant Pack, and each and all of said defendants, claimed that defendant Pack had expended \$1400 on 44

1911 and 1912, for the purpose of representing the same for said years, if any money at all was so expended by defendant Pack for such purpose,—

(b) Whose money, if any, was expended by him,—

(c) How expended,—and

(d) What amount of the same, if any, was so expended and spent for labor and improvements upon said claims which could lawfully be counted, considered or applied as such

of said 175 claims in the annual representation of said claims for 1912. (Tr., p. 32.)

83f. On information and belief that the \$5600 that said defendants claim as having been expended by defendant Pack on said 175 claims in 1911 and 1912 is the same money and cash as the \$1200 and the \$4400 claimed to have been expended by defendant Pack in doing the annual representation work on said twelve claims for 1911 and said 44 claims for 1912, as set forth in said pretended notices of forfeiture. (Tr., pp. 32-33.)

83g. Therefore complainant claims that none of said defendants, and neither of them, are entitled to any contribution from this complainant. (Tr., p. 33.)

83h. That while complainant and his co-locators were engaged in the performance of annual representation on said 175 claims for 1912, they were forcibly prevented from completing said annual representation on the whole of said 175 claims by the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, or by each and all of said corporations, or by their, or each of their agents, employees, representatives, servants or attorneys. (Tr., p. 33.)

83i. That the employees of complainant and his co-locators, and the persons representing complainant and his co-locators in doing said annual representation on said 175 claims for 1912, were—

(a) Forcibly ejected and driven from said claims by said Foreign Mines and Development Company, the American Trona Company, the California Trona Company, or by each and all of them, or by their or each of their agents, representatives, employees, servants, or attorneys, and—

(b) Threatened with great physical violence and injury in case they or any of them returned to said claims, or any of them, or attempted to place on said claims, or any of them, any labor or improvements in the annual representation thereof for 1912. (Tr., pp. 33-34.)

83j. Complainant therefore claims that none of said defendants are entitled to any contribution from complainant for annual representation of said 175 claims, or either of them, for 1912. (Tr., p. 34.)

representation work, and for the expenditure of which he would be entitled to pro rata contribution from this complainant. (Tr., pp. 26-27.)

86. Complainant hereby and herewith offers and stands ready to pay to defendant Pack or these defendants, his proportionate share of any money belonging to defendant Pack which this court finds were expended by defendant Pack on said claims or any of them, as annual representation work thereon for 1911 and 1912, if the court finds he so expended any money at all for such purpose. (Tr., p. 27.)

87. That if defendants are allowed to proceed under said Notice of Forfeiture, they will, at the expiration of ninety days from and after the day of service of said Notice—

(a) File and record copy of said Notice and an affidavit of service with the County Recorder of San Bernardino County, State of California,—

(b) Claim and assert that all complainant's right in said claims has been duly and legally forfeited and extinguished,—

(c) Thereby and by means thereof a cloud will be cast upon the title of complainant in said claims, and—

(d) Complainant will be compelled to institute and prosecute a great number of suits to remove said clouds at a great and exorbitant expense. (Tr., pp. 27-28.)

88. That unless defendants are enjoined and restrained from proceeding to declare the forfeiture of complainant's right in said claims, as claimed in their said Notice of Forfeiture, this complainant will be compelled to institute, prosecute and maintain a multiplicity of suits in order to remove the cloud cast upon his said title in and to the said claims. (Tr., p. 28.)

89. That complainant has no plain, speedy or adequate remedy at law in the premises. (Tr., p. 28.)

90. That unless defendants are restrained and enjoined from declaring a forfeiture of all complainant's right, title and interest in said claims, pursuant to and in accordance with the Notice of Forfeiture, complainant will be irretrievably and irreparably damaged and injured, and be defrauded or deprived of all his right in said claims. (Tr., pp. 28-29.)

A temporary restraining order, an injunction pendente lite and a permanent injunction are prayed for as well as an accounting. (Tr., pp. 29-30.)

The bills are verified, not by complainant, but by one Henry E. Lee. Lee's connection with the litigation does not appear. He gives as his reason for verifying the bill the fact that complainant is without the State of California. (Tr., pp. 30-31.)

At the time that the bills were filed, the District Court, basing its action on the verification of the bills, made its temporary restraining order in each

of these cases directed to the three defendants and appellants named in the bill. At the same time it also issued its order directed to the said appellants requiring them to appear on December 7th and show cause why the temporary restraining order should not be made an injunction pendente lite. (Tr., pp. 36-39.)

On December 8th, 1914, appellants appeared before the District Court and showed cause in law why the temporary restraining orders should not be made injunctions pendente lite. (Tr., p. 41.) The objections then made by solicitors of appellants as to the sufficiency of the bills were overruled by the District Court, which thereafter, and on the 11th day of December, 1914, made its order that injunctions pendente lite forthwith issue in each of the cases. (Tr., pp. 42-49.) Injunctions pendente lite following the terms of the temporary restraining orders, were accordingly issued and served upon appellants.

Thereafter, and within the time allowed by statute, the appellants herein took their said appeal from said order, to this Honorable Court. (Tr., p. 52.)

Specification of Error.

Appellants urge as error the action of the District Court in giving, making and entering its order of December 11th, 1914, by which the said court (1)

granted complainant's application for an injunction pendente lite, and (2) directed that such an injunction issue. (Tr., pp. 50-51.)

Appellants urge that the error of the District Court is one occurring at the very threshold of the case. That an injunction pendente lite has been issued upon a bill that fails to state facts sufficient to place complainant within equity jurisdiction in its broad sense. That even if the bill be assumed to state such facts sufficiently there is no competent proof thereof, of the character required to warrant injunctive relief.

Brief.

Appellants' case rests upon the following propositions:

I.

An injunction pendente lite must be supported by verified statements, as to essential facts, positive, certain and free from conclusions.

Post v. Beacon Vacuum Pump & Electrical Co. (Circuit Court of Appeals, 4th Circuit, January 1898), 84 Fed. 371-373.

"A bill seeking a result which may be so disastrous to the interests of other stockholders as this might be, if its principal prayer were granted, should support itself by decisive allegations. The general rule is that the essential part of a bill in equity should be stated positively and with precision. Story Eq. Pl. (10th Ed.), Secs. 255, 256. This is especially insisted on where a remedy is sought by an injunction

or a rescission, the result of which may not only compensate the party injured, which is all the common law ordinarily gives, but may impair the interests of the adverse party to a vastly disproportionate extent. The underlying principle is stated in the following cases, although applied there from an aspect different from that at bar: *Grymes v. Sanders*, 93 U. S. 55, 62; *U. S. v. American Bell Tel. Co.*, 167 U. S. 224, 241. The common law gives relief on a mere preponderance of proof; but it is certain that, in cases of the class we are considering, equity does not act unless the proofs are clear. The underlying reasons which require also that the allegations which the proofs are to sustain be clear to the effect that the complainant has suffered, or is threatened with, an injury so substantial as to demand, not only compensation, but also specific relief by rescission, even while this may cause a loss to others as to which his own would be comparatively trifling."

This Honorable Court, per Ross, Circuit Judge, has, in reversing an order granting an injunction pendente lite, affirmed the same doctrine in the case of *Anargyros & Company v. Anargyros* (Circuit Court of Appeals, 9th Circuit, February, 1909), 167 Fed. 753, 769, in the following language:

"The well-established rule in equity is that a preliminary injunction should not be granted in a doubtful case."

In the case of *Gaines & Co. v. Srouse*, 117 Fed. (Circuit Court N. D. Cal., December, 1901), 965, 967, Circuit Judge Morrow said:

"It is the general rule that whatever is essential to the rights of the complainant (where the ground for relief by injunction is applied),

and is necessarily within his knowledge, ought to be alleged positively and with precision."

Also see:

Henry Gas Co. v. U. S., 191 Fed. 132, 136;
Owsley v. Yerkes, 185 Fed. 686;
Hall Signal Co. v. General Railway Signal Co., 153 Fed. 907, 908;
Star Co. v. Culver Pub. House, 141 Fed. 129;
Paul Stein System v. Paul, 129 Fed. 757, 760;
Shinkel v. Louisville Co., 62 Fed. 690, 692;
Russell v. Farley, 105 U. S. 433, 438;
10 Enc. of Pl. & Pr., pp. 992-3;
22 Cyc., pp. 953, 954;
Davitt v. American Bakers' Union, 124 Cal. 99, 101.

II.

Where a court's action in granting an injunction pendente lite is based upon a verified statement of facts a material one of which is not only uncertain, but is on information and belief, and not positive, such action rests upon an erroneous hypothesis of pertinent fact.

Anargyros & Co. v. Anargyros, 167 Fed. (Circuit Court of Appeals, 9th Circuit, Gilbert, Ross and Morrow, Circuit Judges, per Ross, Circuit Judge, February, 1909), 753, 769.

This Honorable Court in reversing an order of the District Court granting an injunction pendente lite, says in the above-referred to case (p. 769):

"Looking at the case as made by the pleadings and affidavits, we think the most that can be fairly claimed for the complainant is that it is a doubtful one. Under such circumstances the preliminary injunction should have been denied, and the temporary restraining order vacated."

Lake Shore & M. S. Ry. Co. et al. v. Felton,
103 Fed. (Circuit Court of Appeals 6th Circuit, Lurton, Day and Severens, Circuit Judges, per Severens, Circuit Judge, June, 1900), 227, 230.

"The answer, for the purposes of the motion for a preliminary injunction, may serve as an affidavit, and has only the same effect. The verification of the answer was by one of the solicitors, who made oath that 'the statements of the foregoing answer are true, as he verily believes'. There is no showing, however, that he had made such investigation of the facts as would enable him to speak with assurance, and his qualified statements rather imply that he had not, and there is no extrinsic showing of the contract. It seems to be settled that such a verification of the answer or of an affidavit is insufficient proof upon the hearing of a motion, either for an injunction, or to dissolve one already granted. Barb. Ch. Prac. 156; 2 High Inj. 1514, and the cases there cited; Campbell v. Morrison, 7 Paige, 157; Miller v. McDougall, 44 Miss. 682; Spalding v. Keeley, 7 Sim. 377."

Gaines & Co. v. Sroufe, 117 Fed. (Circuit Court N. D. Cal., December, 1901, Morrow, C. J.), 965, 966.

"The allegations of the bill upon information and belief are insufficient. Whatever is essen-

tial to the rights of the complainant, and is necessarily within its knowledge, ought to be alleged positively."

Willis v. Lauridson, 161 Cal. (1911), 106, 108.

"Before examining the complaint it may be well to state some established rules of law which must govern us in determining its sufficiency as a basis for the extraordinary remedy of injunction. Where the verified complaint is the basis for the relief sought, it takes the place of an affidavit and must be treated as such; and the facts so stated must stand the test to which oral testimony would be subjected. Averments which are but conclusions of law are not competent testimony, though they might stand as matter of pleading. Unless the statement, in the nature of a conclusion, is supported by the facts and circumstances on which it rests, it is insufficient to sustain an application for injunction."

In re United Wireless Telegraph Co., 201 Fed. (1912) 445, 449;

Murray Co. v. Continental Gin Co., 126 Fed. (1903) 533, 534;

Leavenworth v. Pepper, 32 Fed. (1887) 718, 719;

Chicago etc. Ry. Co. v. New York etc. R. Co., 24 Fed. (1885) 516, 519;

Brooks v. O'Hara, 8 Fed. (1881), 529, 532.

III.

There has been reversible error where a court in granting or continuing an injunction pendente lite:

- (a) Has relied upon an erroneous hypothesis of pertinent fact, or
 - (b) Has relied upon an erroneous hypothesis of pertinent law, or
 - (c) Has improvidently exercised its legal discretion.
-

Argument.

Logical sequence is so markedly absent from the allegations of fact in the bills of complaint, that the application of some painstaking analysis is requisite to an intelligent grasp of the theories which the complainant and appellee apparently had in mind as warranting the interposition of special equitable functions.

Upon such analysis it appears that the theories embodied in the bills of complaint can be placed under one of two principal heads.

Under the first head come the theories where the complainant seeks injunctive relief because of alleged defects in the methods in which the defendants and appellants have pursued the forfeiture proceedings instituted by them.

Under the second, and more important, head may be grouped the appellee's theories that this case merits injunctive relief because the defendants and appellants have never had any actual right to institute the forfeiture proceedings inveighed against; and for the defendants to assert such right is for them to be guilty of fraud.

Discussion of the theories grouped under the second head, because more important, warrants first attention.

Appellee in his bill of complaint has pointed to six reasons which he believes to warrant his conclusion that the defendants and appellants have no right to demand contribution from complainant and appellee, and in the absence of contribution, to declare a forfeiture. These reasons may be summarized as follows:

1. Because the defendant and appellant Pack, who was the co-owner of the complainant, expending the money, contribution of complainant's portion of which is sought, in fact did not spend the \$4400 adverted to in the Notice of Forfeiture described in the bill, or, if he did so spend it, did not properly spend it in the performance of annual assessment work. The allegations in the support of this theory will be found in greater particularity hereinabove in the statement of the contents of the bills in paragraphs 5, 6, 10 and 30 thereof, as to the non-expenditure of said money, and in paragraphs 10, 32 and 33, as to the improper expenditure of said moneys.

2. Because certain money, to wit, \$2836, alleged to have been contributed, on behalf of complainant and his co-locators and the co-locators of the defendant Pack, to the defendant Pack to be by him used in the performance of said assessment work, has not been credited to complainant by the defendants in the forfeiture proceedings that they have

instituted against complainant. Reference is hereby made for the details of the allegations upon which this theory is based to paragraphs 74 and 75 of the statement of the contents of the bills herein, as to \$1000 of said \$2836, and to paragraphs 76, 77, 78, 79, 80 and 81 of said statement, as to the balance of \$1836.

3. Because of the existence of an alleged combination and conspiracy between the defendants and appellants, on the one side, and the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, on the other side, to injure complainant and to defraud and deprive him of his interest in said mining claims, and to defeat the locations of complainant and his co-locators, including the defendant Pack. So nebulous and so confusing are the allegations of the bill in support of this theory, that it is necessary, for a greater detail, to look to a large number of the paragraphs in the statement of the contents of the bills herein, namely: as to the fact that the defendant Hutchinson took the conveyance from the defendant Schuler for the sole use and benefit of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, paragraphs 16, 17, 19, 20 and 21; as to the fact that the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company claim rights and interests in the mineral land covered by

the placer locations made and recorded by complainant and his co-locators, including the defendant Pack, paragraph 22; as to the fact that the Foreign Mines and Development Company, American Trona Company, and California Trona Company, have for some years last past been endeavoring to defeat the locations so made by complainant and his co-locators, including the defendant Pack, paragraph 23; as to the fact that the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, have fraudulently attempted to procure defendant Pack's right in said claims for the purpose of using said interest to destroy complainant's right and to defraud complainant out of his interest in said claims, paragraph 24; as to the fact that the defendant Hutchinson has been acting as the agent, representative and attorney of said Foreign Mines and Development Company, American Trona Company, and the California Trona Company in endeavoring to deprive and defraud complainant of his right in said locations, paragraph 25; as to the fact that defendant Hutchinson, under the direction and orders of the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company, fraudulently obtained said transfer from the defendant Schuler in pursuance to the combination and conspiracy referred to, paragraphs 26 and 28; as to the fact that pursuant to said combination and conspiracy the defendants caused to be prepared and served on complainant

the Notice of Forfeiture complained of, paragraphs 27, 28 and 29.*

4. Because the defendant Pack's one-eighth interest in the mining claims, as successors to which the defendants Schuler and Hutchinson appear, was no longer, at the time of the institution of the forfeiture proceedings in any of the defendants, for the reason that (a) defendant Schuler had conveyed to one Shellito prior to her conveyance to defendant Hutchinson, who took with notice of defendant Schuler's conveyance to Shellito, or (b) for the reason that the conveyance from the defendant Schuler to the defendant Hutchinson was without consideration. Reference is made for further details as to the allegation that defendant Hutchinson had notice at the time he took the conveyance from the defendant Schuler, of the defendant Schuler's prior transfer to Shellito, to paragraphs 13, 14 and 15; as to the fact that the transfer from the defendant Schuler to defendant Hutchinson was without consideration, to paragraph 18.

5. Because the sums for which contribution is claimed from the complainant by the defendant Pack are made up of sums for which certain judgments have been rendered against the defendants Pack et al., which said judgments remain unpaid.

* In case No. 2535 alone there are also allegations (see footnotes to paragraphs 82 and 83) that the Foreign Mines and Development Company, the American Trona Company and California Trona Company, in 1912, forcibly prevented complainant and his co-locators from completing their annual representation for that year on the 175 claims. Although not alleged that such prevention was part of the "combination and conspiracy", this character of averment seems logically to belong to none of the other theories embodied in the bill.

Reference is made for further particulars as to these allegations to paragraphs 34 to 73, both inclusive, of the statement of the contents of the bills hereinbefore found, and particularly to paragraphs 38, 46, 58, 68 and 72.

6. Because the sums for which contribution is claimed from the complainant by the defendant Pack are part of a sum of \$5600 for which the defendant Pack claimed contribution from the complainant in a forfeiture proceeding entirely separate and distinct from the one referred to in the bill. Reference as to details of the allegations supporting this theory is hereby made to paragraphs 82 and 83 of the foregoing statement of the contents of the bills of complaint.

THEORIES RELIED UPON BY THE COURT TO SUPPORT ITS ORDER GRANTING INJUNCTION.

Reference to the opinion filed by the court at the time of making its order granting the injunction pendente lite (Tr., pp. 43-47) discloses the fact (Tr., p. 45) that the court considered theories hereinabove in this brief enumerated as 1 and 2, as determinative of complainant's right to injunctive relief.

While the opinion more particularly considers the bill of complaint on file in the case relating to 175 claims (Case No. 2535), the attitude of the court therein expressed as to the matters specifically under discussion is of equal application to both the present case (No. 2537) and No. 2536.

The court says (Tr., p. 45): "Plaintiff then alleges that the said Pack did not expend or cause to be expended of his own money, during the years 1911 and 1912, or at any other time, the sum of \$5600, of which the said \$700 was the one-eighth part, upon or for the benefit of said placer mining claims, or at all; that at least \$2836 was contributed by plaintiff and his co-locators to the defendant Pack for the purpose of doing the assessment work upon the claims mentioned, for the years 1911 and 1912."

The only allegations in the bill upon which the opinion of the court in the first of these respects (i. e., alleged non-expenditure of money) can rest, are found in the foregoing statement of the contents of the bills in paragraphs 5, 6, 10 and 30 thereof. The first of these allegations is, it is true, positive in its terms, but is coupled with an important qualification: That Pack did not spend \$4400 "of his own money or funds" (Tr., p. 7). Well separated from this allegation by averments entirely immaterial to this theory is found a subsequent allegation, upon information and belief "that the said Pack never, during the year 1911, or at any other time, expended * * * the sum of \$4400 of his own funds or money, or any other sum or amount, in and upon said claims, * * * or any of them, for any purpose whatsoever." (Tr., pp. 14 and 15.)

Confusion as to just what the person verifying the bill does know to be true may well arise from

the different methods of treating two so similar averments. Nor does it simplify the dilemma to find in paragraph 10 (Tr., p. 9) an allegation upon information and belief "that the said defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said placer mining claims * * * for the year 1912, expended a greater part or portion, or all of such money, in the transportation of men and supplies to Searles Borax Lake, San Bernardino County, California, where said mining claims are located, and in furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported * * * for the purpose of performing said representation work during said year upon said claims".

Surely a positive assertion that defendant Pack did not spend his own funds is in no wise inconsistent with the fact that the said defendant Pack spent funds loaned to him or advanced to him, or on his behalf, by other persons. If the money was spent by Pack, so far as this complaint is concerned, he cannot take exception to a demand by Pack for contribution for such expenditure. If no money whatever was spent by Pack why does the complainant, who seeks the aid of equity to deprive Pack, or at least to delay him in the assertion of a substantial right (see *Badger etc. Co. v. Stockton etc. Co.*, 139 Fed. 838, 841-2), not bring forth a verified statement in proof thereof? This omission might be laid upon the head of a careless pleader, were it not for the added doubt occasioned by the

second line of attack which presupposes the expenditure by Pack of the funds, but assails it as not properly made. Such verified statements present the testimony of one whose lack of accuracy arouses suspicion as to his motives rather than sympathy for him as a slovenly pleader.

Another feature calling for a most careful scrutiny is the verification attached to the bill of complaint taken in connection with the two above-referred to statements, one positive, and one on information and belief as to the same matter. The affiant Lee in the verification takes oath (Tr., pp. 30, 31) that "he has personal knowledge of all the facts and matters therein (in the complaint) alleged, and knows them to be true, except as to those matters therein alleged upon information and belief, and as to them, he believes them to be true". Such an affiant, face to face with conclusive proof that the defendant Pack had in truth spent \$4400 of his own funds upon the claims, could find escape from his embarrassment in the similarity of the positive averment to the one upon information and belief. According to his verification he only believes to be true the matter alleged upon information and belief. If certain matter occurs in the complaint upon information and belief he has but given to the court his testimony as to what his belief is as to that matter. And that same matter, regardless of how many times it may appear in the complaint, or in how many forms, is only testimony as to belief. It is not as though an affiant had said in so many words "I positively swear that

Pack did not spend any money of his own"; and had then said, "Upon information and belief I swear that Pack did not spend any money at all." In this case there is a significant distinction; it is said "On information and belief I swear that defendant Pack did not spend any of his own money or any money at all." In other parts of the bill the same matter recurs without, it is true, having before it the statement that it is on information and belief, but at the same time without having before it the statement that it is meant to be positively asserted as the personal knowledge of the affiant.

It is to guard against just such evasions and equivocations that there are these equity rules:

That bills must show candor and frankness.

Moffat v. County Commissioners, 97 Md. 266, 270; 54 At. 960, 962;

Lamm v. Burrell, 69 Md. 272, 274-6; 14 At. 682, 683-4;

McDowell v. Biddison, 120 Md. 118, 125; 87 At. 752, 755;

Blackwells Durham Tobacco Co. v. American Tobacco Co., 145 N. C. 367, 369; 59 S. E. 123, 128.

That where there are contradictory or inconsistent allegations the equity will be tested by the weaker rather than by the stronger allegation.

Godwin v. Phifer, 51 Fla. 441, 454; 41 So. 597, 601;

Camp v. Matheson, 30 Ga. 170.

That allegations must not be argumentative.

Mead v. Stirling, 62 Conn. 586, 596;
Battle v. Stephens, 32 Ga. 25;
Stinson v. Ellicott City etc. Co., 109 Md. 111,
 116; 71 At. 527, 529;
1 High on Injunctions (4th Ed.), sec. 34.

And paramount to these rules, both because of the dignity of the courts in which it prevails, and because of its long and well-defined existence, is the rule that

“such a verification (on information and belief) * * * of an affidavit is insufficient proof upon the hearing of a motion either for an injunction or to dissolve one already granted.”

Lake Shore and M. S. Ry. Co. v. Felton, Circuit Court of Appeals, 6th Circuit, June 15, 1900, Lurton, Day and Severns, Circuit Judges, per Severns, Circuit Judge, 103 Fed. 227 at 230;

In re United Wireless Telegraph Co., 201 Fed. (1912) 445, 449;

Murray Co. v. Continental Gin Co., 126 Fed. (1903) 533, 534;

Leavenworth v. Pepper, 32 Fed. (1887) 718, 719;

Chicago etc. Ry. Co. v. New York etc. R. Co., 24 Fed. (1885) 516, 519;

Brooks v. O'Hara, 8 Fed. (1881) 529, 532.

FAILURE TO CREDIT COMPLAINANT'S ADVANCES.

The sum of \$2836 referred to in the court's opinion as having been contributed by complainant and his co-locators to the defendant Pack, for which Pack has failed to credit complainant, is made up of two sums. One of these is \$1836; the other \$1000. (See paragraphs 74 to 81, statement of contents of bills, Tr., pp. 24, 25.)

The form in which the complainant has presented his proof of the payment of the \$1836 is hardly calculated to inspire boundless trust in the artless candor of the pleader; nor can it fail to arouse the keenest admiration at what now appears, not as familiarity with the books on pleading, but as a refinement of crafty legerdemain. By this magic the pleader would transmute before the eyes of the unwary and credulous the dross of the evidentiary fact, a mere written evidence of indebtedness, into the more substantial metal of ultimate fact, a bona fide debt due, owing and, it is to be inferred, unpaid from the defendant Pack to complainant and his co-locators.

The pleader says: Prior to December 1911 the defendant Pack "duly acknowledged in writing that he was indebted to one Henry E. Lee (presumably the same Lee who verified complainant's bill), the duly authorized agent of plaintiff and his co-locators". The pleader does not say that the defendant Pack was indebted to Lee and that the indebtedness was at that time due, owing and unpaid. Most assuredly had this been the case, Affiant Lee

might well have set forth the ultimate fact concerning Creditor Lee. Had this been done more substance would have been lent to the allegation following, that "said Lee, acting as such agent for plaintiff and his co-locators, directed the said defendant Pack to use and utilize all of *said money*, or so much thereof as might be necessary, in the annual representation of the placer mining claims * * * for the years 1911 and 1912, and that the said defendant Pack agreed with the said Lee that he would so utilize and use *said money*". To what does "*said money*" refer? Certainly its existence as "*said money*" sprang from the written acknowledgment of indebtedness, and from nothing more. Nor is the doubt as to the parentage of "*said money*" dispelled in the subsequent averment that "*said money and indebtedness was money due and owing to this plaintiff and his co-locators from the said defendant Pack, duly evidenced by his written acknowledgment of such indebtedness to the said Lee, the duly authorized agent of this plaintiff and his co-locators*". Such care! Such clearness! How circumspectly Affiant Lee sets forth the acts of Agent Lee and the acts of Creditor Lee!

The balance of the sums said to have been contributed by complainant and his co-locators to the defendant Pack is named as \$1000. (See paragraphs 74 and 75 of the statement of the contents of the bills; Tr., p. 24.) The allegation of the bill as to the fact of the payment of this sum is definite and clear. Its form throws into vivid relief the

inadequacy of the allegations concerning the alleged payment of the \$1836. For once Affiant Lee states in so many words that Agent Lee, as the duly authorized agent and representative of this plaintiff, and of his co-locators, paid to the said defendant Thos. W. Pack, for this plaintiff, and for his said co-locators, in their respective proportionate shares, the sum of \$1000, as a portion of their pro rata contribution, for the doing of said actual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and used in said actual assessment work thereon". But from this point on there is a lapse again into the realm of uncertainty. Says Affiant Lee: "That as plaintiff is informed and believes, the said Thos. W. Pack did so use the said sum of \$1000 for said purpose in said year."

If the fatally defective form of such an averment ("The correct form of averment is that set forth in *Story Eq. Pl.* (8th Ed.), p. 249, viz: 'That plaintiff has been informed and believes, and therefore avers'"); *Wyckoff v. Wagner Typewriter Co.*, 88 Fed. 515, 517; *Murray Co. v. Continental Gin Co.*, 126 Fed. 533, 534) does not open the allegation to destructive criticism, the conspicuous absence of any averment that the defendant Pack has not properly credited to complainant and his co-locators the \$1000 paid him, renders the relevancy and therefore the potency of the averment as to the payment of little value.

CONCLUSIONS AS TO THE THEORY OF FAILURE TO CREDIT.

Even if, for the sake or argument, fullest credit be given to all the complainant's allegations in support of the theory of failure to credit, it is, with the greatest deference, difficult to see how such averments warrant the conclusion that an injunction should issue. Admit that \$2836 had been actually paid to the defendant Pack. By the terms of the bill it was paid to him on behalf of complainant and his co-locators, who include the defendant Pack himself. The payment of such a sum would amount to a contribution on the part of each of eight locators, including the defendant Pack, of \$354.50. By the terms of the bill the contribution was made for the performance of assessment work for 1911 and 1912. In case No. 2536 it appears that the defendant Pack claims to have expended \$1200, or \$150 for each locator, and this case, No. 2537, \$4400, or \$550 for each locator. Case No. 2536 applies to the work for 1911; case No. 2536 applies to the work for 1912. It therefore appears that the defendant Pack claims to have expended \$700 for each locator for both 1911 and 1912; \$150 for 1911 and \$550 for 1912. As against this sum the complainant has, at best, made out a contribution of \$354.50, on the part of each locator, for both 1911 and 1912, or a difference in defendant Pack's favor of \$345.50. It cannot be denied that the defendant Pack has the right to pursue forfeiture proceedings and by them enforce the payment by his co-locators of at least this sum, or, upon their default, to acquire their

interests thereby. Even assuming that a court of equity would be warranted in restraining the completion of forfeiture proceedings, under such circumstances, where the amount as to which the co-locator is delinquent is actually paid into court, no such payment has been made in the present cases. Furthermore, there are no facts alleged by the complainant to show in what proportion the amount said to have been contributed by the complainant and his co-locators was to be applied to 1911 and to 1912.

INTERFERENCE WITH PERFORMANCE OF ASSESSMENT WORK.

The court's opinion, as has been noted, was filed in case No. 2535, in which the bill of complaint attacked the forfeiture proceedings as to 175 claims. In that bill alone occurs the allegation upon which the following portion of the court's opinion rests:

"It is also alleged that in the year 1912, while plaintiff and his co-locators were engaged in the performance of the annual assessment work upon said claims, they were forcibly prevented from completing the said assessment work, and were forcibly ejected and driven from said claims, by the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company."

While it may be necessary, therefore, to consider these allegations with reference to the bill relating to the 175 claims, they are not before the court in

either the present case, No. 2537, or in Case No. 2536.*

OTHER THEORIES.

By dint of a careful combing of the bill of complaint and a rearrangement of the allegations therein, it is possible to discern four additional theories which have as their basis the proposition that the defendants never have had any right to institute forfeiture proceedings. The District Court does not touch upon these in its opinion. Doubtless they have been ignored because of their patent insufficiency. They will, therefore, be passed upon most briefly here.

There may be mentioned the allegations as to the existence of an alleged combination and conspiracy between the defendants, on the one side, and the Foreign Mines Development Company, the American Trona Company, and the California Trona Company, on the other side, to injure complainant and to defraud and deprive him of his interest in said mining claims. It is difficult to point to any precise allegation as to the existence of such a combination and conspiracy. There are, however, certain acts alleged to have been done by

* These allegations in their application to case No. 2535 betray no relation of relevancy to any of the various theories of the bills. From the averments it appears that complainant and his co-locators, who at that time necessarily included the defendant Pack, were the victims of the asserted interference. No community of interest in the interference is alleged to have existed between the companies involved and the defendants. Even the pleader's conclusions as to the performance of the acts in pursuance of a "combination and conspiracy", which are liberally applied to other acts set forth in the bills, are lacking here.

one or more of the defendants pursuant to such a combination and conspiracy, which we may assume, for the sake of argument, to have been alleged in these general terms to exist. The allegations as to these various acts recur at such frequent intervals in the bill as to become a monotonous formula. In each of them the portentous words, "combination and conspiracy", stand alone, without the support of particulars. There occurs, following the allegations that the defendant Schuler had conveyed the interest in the claims which she derived from the defendant Pack to one Shellito prior to her transfer to the defendant Hutchinson, and that the defendant Hutchinson took from the defendant Schuler with knowledge of her prior transfer, the statement that the defendant Hutchinson took the conveyance in pursuance of a combination and conspiracy (Tr., pp. 10 and 11). Immediately following this we find the same matter repeated upon information and belief (Tr., p. 11). Aside from questions as to its materiality, the inadequacy of the form in which this fact is presented seems obvious.

There occurs the allegation mentioned in the District Court's opinion, that the defendant Hutchinson, if he acquired any title at all from the defendant Schuler, holds the same for the benefit of the Foreign Mines and Development Company, or the American Trona Company, or the California Trona Company, or for part or all of them (Tr., pp. 10 and 11). The paragraph in which this is found commences with the statement that "The

plaintiff further alleges upon his information and belief." It is, therefore, matter of doubt as to whether or not the allegation itself, following in the same paragraph, is not also meant to be upon information and belief. Here, again, are the objections of both immateriality and defective presentation.

There occurs an allegation, in entire keeping with the clearness of the complainant's other allegations, that the Foreign Mines and Development Company, the American Trona Company, and the California Trona Company "claim rights and interest in and to the mineral lands covered by said placer locations" (it does not appear that these rights are claimed adversely to the complainant and his co-locators), and "for some years last past have been endeavoring to defeat the complainant's locations" (Tr., p. 12).

Following this the pleader has departed from his rule of leaving one in doubt as to the sufficiency of his allegation. He has inserted an averment, beyond argument fatally defective, to the effect that "the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company have * * * as plaintiff is informed and believes, fraudulently attempted to procure the right, title and interest of defendant Pack in * * * said locations * * * for the express purpose * * * of using the said interest * * * in such a way * * * as to destroy all of plaintiff's right therein, and to defraud plaintiff

out of all interest in * * * said claims" (Tr., p. 12).

There is immediate return, in that plaintiff "further alleges on like information and belief", to the safer paths of mere uncertainty. This allegation concerns the fact that defendant Hutchinson has been acting as the agent of the three above-named companies in endeavoring to deprive and defraud plaintiff of his rights in said mining locations (Tr., p. 13).

Following this there occur allegations of the following acts: That the defendant Hutchinson, under the direction and orders of the three companies, fraudulently obtained transfer from the defendant Schuler; and that the three defendants caused the Notice of Forfeiture to be served. All this in pursuance of the combination and conspiracy. This matter is laboriously repeated, as though the proper pleading of a combination and conspiracy depended upon the number of times the words appear within a given space (Tr., pp. 13 and 14). Some of the strength of this argument, however, is taken from it by the fact that one of the repetitions is upon information and belief (Tr., p. 14).

These charges are followed by confusion more pretentious as to length. It constitutes seven pages (Tr. pp. 15-24) devoted to the histories of five actions pending in the Superior Court of the State of California, in which the defendant Hutchinson appears as attorney for plaintiff in each case. It appears that in two of these actions defendant

Pack figured as a defendant, and in the other three the defendant Schuler. By paraphrasing the allegations of the complaints in these various actions, the complainant asserts that the claim upon which each one of them was founded was for either goods or services furnished to Pack in the performance of annual assessment work upon the mining claims in dispute. It is alleged that judgments have been obtained in some of these actions which are still unpaid, and that the amounts of these judgments and the amounts involved in the other actions constitute part of the amounts claimed by the defendant Pack in his Notice of Forfeiture to have been expended by him. This latter allegation, in each instance, is based upon information and belief. Such comment should suffice.

So much for the additional theories of this class which diligence discloses in the bills.

With respect to the theories discernible in the bill and based upon the proposition that the methods pursued by the defendants in prosecuting their forfeiture proceedings are defective, little need be said. They all turn upon a fancied need for equitable interposition to prevent the use, in clouding complainant's title, of notices of forfeiture fatally defective upon their face. The mere statement of such a theory is sufficient to destroy it. No cloud can be cast upon title by an instrument or proceeding that is defective upon its face. The allegations in this connection are found in the Transcript beginning on page 8 thereof.

ASPECT OF THE SITUATION UPON APPEAL.

The eyes of an appellate court reviewing the action of a District Court in granting an injunction pendente lite, are directed chiefly upon two inquiries: First, has the District Court "proceeded upon an erroneous hypothesis of pertinent fact or law"? Second, has the District Court "improvidently exercised its legal discretion"?

Acme Appliance Co. v. Commercial etc. Co.,
(Circuit Court of Appeals, 6th Circuit),
192 Fed. (December, 1911) 321, 323.

In the pursuit of the first of these inquiries there come before the appellate court the bills in these cases as they stand alone, their material allegations uncontroverted. Unless it can be said, after examination of these bills, that the hypothesis of pertinent fact which the District Court erected as the structure to support its injunctions is without material flaw, the action of that court should be reversed.

It has been pointed out wherein the bills as a whole are woefully deficient in logical theory upon which the complainant has proceeded. Still more deficient, because of its incompetency, is the evidence brought forward in support of each theory.

As a foundation for each theory, testimony, in the form of positive verified statements of fact, is necessary. In no single one of the theories advanced by the complainant, is every fact material thereto upheld by such testimony. If these premises are correct, the conclusion cannot but follow

that any judicial action which rests upon any one of these theories rests upon an erroneous hypothesis of pertinent fact. This conclusion once properly reached calls into action in these cases the corrective authority of the appellate court.

In the case of *St. Louis Street Flushing Machine Co. v. Sanitary Street Flushing Machine Co.* (Circuit Court of Appeals, 8th Circuit, April, 1908), 161 Fed. 725, the same weakness as appears in the present record was presented to the appellate court. The case was one which came before the appellate court on appeal from an order granting a preliminary injunction. An injunction had issued upon a bill showing an infringement of complainant's patent. The appellate court at some length first discusses the improvident exercise, in the issuance of the injunction, of the District Court's legal discretion, upon the situation as presented by the entire record. It then goes on to say:

"For another reason, also, the preliminary injunction ought not to have been granted. It is a fundamental principle that injunctions ought not to issue unless the right alleged to be invaded or threatened is clear. As said in *Truly v. Wanzer*, 5 How. 141, 12 L. Ed. 88, 'There is no power the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and necessary remedy in damages. The right must be clear, the injury impending and threatened, so as to be averted

only by the protecting, preventive process of injunction.' The affidavits in support of and against the motion for injunction leave the existence of the available license relied on by complainant in grave doubt and uncertainty, too doubtful and uncertain, at least, to warrant interference with the status quo, until the right can be deliberately ascertained and declared at final hearing.

"The order awarding the preliminary injunction was improvidently made. It must, therefore, be reversed and the cause remanded, with direction to deny the motion. It is so ordered."

Again, in *Henry Gas Co. v. United States* (October, 1911), the Circuit Court of Appeals in the 8th Circuit (191 Fed. 132, 136), in considering an appeal from an order granting an interlocutory injunction, on which appeal the order was reversed, said:

"Upon these facts the Circuit Court granted a preliminary injunction against the defendant as prayed in the bill; and the sole question for determination is, was it rightly granted?

"The granting of or refusal to grant a preliminary injunction rests in the sound judicial discretion of the court; but it is a cardinal principle of equity jurisprudence that it will not be granted unless the right to it is clear, the injury impending, and threatened so as to be averted only by the preventive process of injunction (*Truly v. Wanzer*, 5 How. 141, 142; 12 L. Ed. 88; *St. Louis Street Flushing Machine Co. v. Sanitary Flushing Machine*, 161 Fed. 725-728), or the case is such that the status quo should be maintained until the final hearing. (*City of Newton v. Levis*, 79 Fed. 715-718; *Denver & R. G. R. Co. v. United States*, 124 Fed. 157-161.)"

This Honorable Court, per Gilbert, Circuit Judge, has expressed its view, as to the effect on appeal, of the lower court's disregard of the facts or of the principles of equity applicable to the case, in the following language:

Alaska Pacific Ry. & Terminal Co. v. Copper River and N. W. Ry. Co., (9th Circuit, 1908), 160 Fed. 862-865:

"The office of a preliminary injunction is to preserve the subject of the controversy in its present condition, in order to prevent the perpetration of a wrong or the doing of an act whereby the subject of the controversy will be materially injured or endangered, until a full investigation of the case may be had, and a preliminary injunction will never be granted unless from the pressure of an urgent necessity. The damage threatened, and which it is legitimate to prevent, during the pendency of the suit, must be, in an equitable point of view, of an irreparable character (16 Am. & Eng. Enc. of Law, 345). And the rule is well settled that the granting or withholding of an injunction pendente lite ordinarily rests in the sound discretion of the court to which the application is made, and the ruling thereon is not subject to reversal in an appellate court, *unless there has been abuse of discretion evidenced by a disregard of the facts or of the principles of equity applicable to the case.* Vogel v. Warsing, 146 Fed. 949, and cases there cited."

CONCLUSION.

We respectfully urge in conclusion that in the three cases now before the court there are presented two errors on the part of the District Court:

1. (a) The erroneous hypothesis of pertinent fact upon which the lower court proceeded in the issuance of the injunction pendente lite upon unverified material facts;

(b) The erroneous hypothesis of pertinent law in the issuance of the injunction upon the assumption that the case presented the equity necessary to warrant injunctive relief.

2. The improvident exercise by the District Court of its legal discretion in disregarding the cardinal equity principle that complainant for an injunction must present a case free from doubt.

Appellants therefore respectfully urge a reversal of the order granting injunctions pendente lite in Cases Nos. 2535, 2536, 2537, together with appellants' costs on these appeals incurred.

Dated, San Francisco,
January 22, 1915.

Respectfully submitted,

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Appellants.



Nos. 2535, 2436, 2537.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,
Appellants,
vs.
E. THOMPSON,
Appellee.

Brief on Behalf of Appellee.

Upon Appeal from the United States District
Court for the Southern District of California,
Southern Division.

R. P. HENSHALL,
Merchants National Bank Bldg., S. F.,
H. L. CLAYBERG,
JNO. B. CLAYBERG,
WELLES WHITMORE,
Pacific Building, San Francisco,
Solicitors for Appellee.

Filed this _____ day of January, A. D., 1915

FRANK D. MONCKTON, Clerk.

By _____ Deputy Clerk

THE TEN BOSCH COMPANY, SAN FRANCISCO

FEB 1 1915

NOS. 2535, 2536, 2537

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THOMAS W. PACK,
STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Appellants,

vs.

E. THOMPSON,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

These three cases are before this Court on separate appeals from orders made in each case, granting injunctions *pendente lite* upon the hearing of orders to show cause.

In case No. 2535 there were involved 175 placer

claims, and the Notice of Forfeiture claimed \$5,600.00 due on account of annual representation claimed to have been performed on such claims for the years 1911 and 1912.

In case No. 2536, 12 placer claims are involved and the Notice of Forfeiture claims \$1,200.00 spent by appellant Pack in representing such claims for the year 1911.

In case No. 2537, 44 placer claims are involved and in the Notice of Forfeiture appellants claim that appellant Pack expended \$4,400.00 on such claims for the representation thereof for the year 1912.

The allegations of the respective complaints and the Notices of Forfeiture, which are attached thereto, disclose that in No. 2535 forfeiture is sought for the same amounts of money claimed to have been expended in 1911 and 1912 as is claimed by such notices relating to the representation of 12 claims in 1911 and 44 claims in 1912.

Counsel for appellants, in their statement of the case utilize the bill filed in No. 2537 and carefully abstain from any extended references to No. 2535 wherein the same amount of money is demanded as representation expended on the 175 claims. Counsel also fail to state that the 12 claims represented in No. 2536 and the 44 claims in No. 2537 are a part and parcel of the 175 claims in No. 2535. In the statement is also omitted an allegation which is found in the complaint in No. 2535, (record, pages 33 and 34), in which it is alleged that the complainant and his co-locators, while engaged in the performance of the

annual representation upon said 175 claims for the year 1912 were forcibly prevented from completing the same upon the whole of said claims by the Foreign Mines Development Company, the American Trona Company and the California Trona Company, or their agents and employees, and that complainants and their employees were forcibly ejected and driven from the claims by the said companies, or their agents, and that they were threatened with great physical violence and injury if they, or either of them returned to work on the placer claims.

Following the example set by counsel for appellants of filing only one brief in all of these cases, we shall also present but one brief in behalf of the appellee.

It is well for the Court to remember that upon the filing of the complaints in each of these three cases, Judge Bledsoe granted an order to show cause why the injunction prayed for should not be granted, and restrained defendants in such suits, until the hearing of the order to show cause. The order to show cause came on for hearing before the Court on December 8th, 1914, and appellants filed no affidavits or papers of any kind in their behalf, but submitted the matter to the Court below upon the complaint and affidavit attached thereto. As said by Judge Bledsoe in his opinion rendered upon the hearing of the order to show cause, after reciting and summarizing the essential allegations of the complaint, which were made positively:

"If these facts thus alleged be true, and at this time the Court must assume them to be true, because no affidavit or answer in opposition to or in explanation of them, has been presented by the defendants, then it would appear that the defendants have no right to claim or exact a forfeiture, as against the plaintiff, for his failure to contribute his share of the assessment work, and that the proceedings on the part of defendants, leading up to the service of the notice of forfeiture, and in the recording thereof, are substantially a nullity, in so far as they seem to have effected a divesture of plaintiff's undivided interest in and to the mining property in question. On such a state of facts I apprehend the Court, after an accounting or other appropriate investigation, would make a decree determinative of the rights of the parties and the protection thereof. This decree, under the ease as made by the facts to be taken as true would in its substantial aspects be in favor of the plaintiff." (Rec. p. 46.)

Judge Bledsoe then determines that from the facts alleged, a cloud would be cast upon the title of complainants in the property described in the complaints, by the recording of the copy of the Notice of Forfeiture and the affidavit of its personal service, and directs that an injunction *pendente lite* issue in behalf of the complainants.

We have not time to consider these three cases separately, although No. 2535 may be considered a stronger case upon the Notice of Forfeiture than either of the others, but we are willing to submit the matter to the Court for its decision upon all the cases, after calling the attention of the Court to a few fundamental principles applicable thereto.

The purpose of the bills of complaint was to procure an accounting of the moneys claimed to have been expended by Thomas W. Pack, one of the appellants, in the alleged representation of certain placer mining ground, described in the bills of complaint, and to enjoin the defendants named therein, from taking any steps toward a forfeiture of complainants rights and interests in these placer claims, until it could be determined how much, if any, money had been actually paid by Pack in such assumed annual representation of the claims. The complainants by their bills offer to pay defendants in said suits whatever amount the Court might decide had been expended by Pack for the purpose of annual representation.

The theory of the bills of complaint is, that the filing of a copy of the notices of forfeiture, with an affidavit of service thereof, would create a cloud upon the respective complainants interest in the property described in the various complaints; that the Court should prevent the casting of such cloud on complainants' title, by its writ of injunction, until it was determined how much, if anything, appellant Pack had expended upon the property and an opportunity given to the complainants to pay such amount and prevent a forfeiture of their interest in the property.

It would require extrinsic proof to remove the effect of a recordation of a copy of the Notice of Forfeiture and the Affidavit of Service, because under Section 2324 R. S. U. S., if one co-owner of a mining claim fails to contribute his proportionate share of

the expense of the representation of such claim, and receives personal notice from the co-locator who expended the money, unless he pays such money, within ninety days from the service of the notice, his rights are forfeited. By a recordation of a Notice of Forfeiture and the affidavit of service under Section 1426 & Cal. C. C., a presumption arises that the co-owner upon whom the Notice of Forfeiture was served has failed to contribute his share. In order to remove the effect of filing of copies of these notices and affidavit of service, we would be compelled to show extrinsically such facts as would render the same void and of no effect. We do not hesitate, therefore, to say that the filing of the copies of the Notice of Forfeiture and the Affidavit of Service, would cast and create a cloud upon the title of complainants in the property mentioned in the complaints.

Pixley v. Huggins, 15 Cal. 128.

Whitney v. Port Huron, 88 Mich. 268.

Waterbury Savings Bank v. Lawler, 46 Conn. 243.

McConnaughy v. Pennoyer, 43 Fed. 339.

Lubbock v. McMann, 82 Cal. 226.

It is a well known doctrine that equity has jurisdiction to *prevent* the casting of a cloud upon title.

Palmer v. Boling, 8 Cal. 388.

Tibbetts v. Fore, 70 Cal. 243-47.

Mechanics Bank v. City of Kansas, 73 Mo. 555-559.

Hare v. Carnall, 39 Ark. 196-202.

Burnett v. Cincinnati, 3 Ohio, 73-88.

McConnaughy v. Pennoyer, 43 Fed. 339.

Pixley v. Huggins, 15 Cal. 128.

The material allegations of the complaint, properly ~~pleaded~~ ~~pledged~~, must be admitted to be true upon this hearing. It is true that many of the allegations of the complaint are upon information and belief, yet sufficient positive allegations are contained therein to warrant the Court below in granting the injunction prayed for.

Judge Bledsoe in his opinion upon hearing of the order to show cause under which the injunctions *pendente lite* were granted, summarized the positive allegations of the complaint as follows:

"That the plaintiff in the year 1910, in conjunction with the defendants, Pack and certain other individuals mentioned, located and recorded 175 certain placer mining claims, situate in the County of San Bernardino, State of California; that plaintiff is now, and ever since the day of said location, has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims, and each of them; that during the month of September, in the year nineteen hundred and fourteen, the defendant herein, caused to be served upon plaintiff a certain Notice of Forfeiture set out in the bill of complaint and by which it was sought, pursuant to the Sections of the Revised Statutes and Civil Code above referred to, to forfeit the title of plaintiff in and to each and all of the one hundred and seventy-five described placer mining claims heretofore referred to; that said Notice contained the appropriate statements that unless plaintiff, within ninety days after the service of the same upon him, paid to the defendants, or to the defendant, Joseph K. Hutchinson, for said defendants, the sum of Seven Hundred Dollars (\$700) claimed to be one-eighth of the total

amount of money claimed to have been expended by the said defendant Pack, upon said claims, in the years nineteen hundred and eleven (1911) and nineteen hundred and twelve (1912); that the interest of plaintiff would become forfeited to the said Joseph K. Hutchinson; plaintiff then alleges that the said Pack did not expend, or cause to be expended, of his own money, during the years nineteen hundred and eleven (1911) and nineteen hundred and twelve (1912), or at any other time, the sum of Fifty-Six Hundred (\$5600.00) Dollars, of which the said Seven Hundred Dollars (\$700) was the one-eighth part upon or for the benefit of said placer mining claims, or at all; that at least twenty-eight hundred and thirty-six (\$2836.00) Dollars was contributed by plaintiff, and his co-locators, to the defendant Pack for the purpose of doing the assessment work upon the claims mentioned for the years nineteen hundred and eleven (1911) and nineteen hundred and twelve (1912); plaintiff further alleges that whatever title or interest the said Hutchinson obtained or holds in and to the said claims, was obtained and is held for the sole use and benefit of the Foreign Mines and Development Company, the American Trona Company and the California Trona Company."

All of these allegations being deemed to be true, there can be no question but that they presented a case to the Court, which authorized the issuance of an injunction *pendente lite*, to hold the situation between the parties in *status quo* until the final determination of the suit.

For any further argument of these appeals, appellee refers to his brief this day filed in this Court in Nos. 2539 and 2540, Thomas W. Pack, et al, appellee

lants v. E. Thompson, appellee, and hereby makes said brief in so far as applicable to the questions involved herein, a part of this brief.

We submit that the orders appealed from should be affirmed.

R. P. Henshall
H. L. Clayberg
Jno. B. Clayberg
Welles & Hitmeyer

Solicitors for Appellee.



IN THE
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THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Appellants,

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THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Appellants,

vs.

CECIL C. CARTER,

Appellee.

SUPPLEMENTAL AND CLOSING BRIEF ON BEHALF
OF APPELLEES.

R. P. HENSHALL,
Merchants National Bank Bldg., S. F.

H. L. CLAYBERG,
JNO. B. CLAYBERG,
WELLES WHITMORE,
Pacific Building, San Francisco,
Solicitors for Appellees.

Filed this day of February, A. D., 1915

FRANK D. MONCKTON, Clerk.

By Deputy Clerk.

Nos. 2535, 2536, 2537, 2538, 2539 and 2540.

IN THE
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THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

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Appellants,

vs.

CECIL C. CARTER,

Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

1. Because of the length of appellants' original briefs in Nos. 2539 and 2540 and Nos. 2535, 2536 and 2537 and the short time at our disposal for the preparation of our briefs, we failed to insert therein any statement as to our position with reference to the point suggested on page 94 of their brief filed

in cases Nos. 2539 and 2540, namely that "no bond was required of complainants."

As we understand the law and practice of the United States Courts, it is entirely discretionary with the Court below to require a bond on the issuance of an injunction.

The rule, as established by the Courts of Appeal and the Supreme Court of the United States, is that no bond will be required upon the granting of an interlocutory injunction if the Court below is satisfied that the right of the party in whose favor it is granted, is clear, and that no serious injury will be incurred by the party against whom the injunction is issued.

Briggs v. Neal, 120 Fed. 224;

Russell v. Farley, 105 U. S. 433;

Meyer v. Black, 120 U. S. 206.

Evidently, Judge Bledsoe did not think that the case was one in which a bond should be required. Judging from his opinion, as printed in the record, he found that the complainants' case was clear and that no injury or damage could result to the defendants. He, therefore, properly exercised his discretion by not requiring a bond.

But again, the failure to give a bond, when the same was not ordered or conditioned by the Court below, would surely be insufficient to warrant the reversal of the orders granting the injunctions.

If this Court should be of the opinion that a bond

should have been required, in our judgment it possesses full and complete authority to direct a bond to be given by the complainants in such amount as it sees fit to require, and that a condition be attached to the order that if such bond is not filed by the complainants within a certain time limited in the order, then the injunctions should be dissolved.

In case this Court does not feel satisfied that it has jurisdiction to make such order, it would have the right, upon remitting the case to the Court below, to direct that Court to require a bond to be given.

It is difficult, however, to conceive how this Court can say that the Court below committed error in not requiring a bond, for many reasons, among which is that no suggestion was made to the Court by counsel for appellants that a bond should be required, and no demand or request for it was ever made to the Court below. Its attention was not called, in any way to the giving of a bond, and it is difficult for us to conceive how error can be charged against the Court below, when the matter, claimed to be erroneous, was not presented to the Court for consideration, and not decided by it.

See Inv. Albany W. W. v. Louisville B. Co., 122 Fed. 776 (C. C. A.).

But again, all the injunctions were made reciprocal by the order of the Court without a bond being required of or from either of the parties to the suit. (See Record, No. 2540, p. 87.)

If a bond should be required in favor of appellants one should also be required in favor of the appellees.

We submit: 1st. That this question of the giving orders appealed from should not be reversed on that be considered; 2nd. If considered by the Court the of a bond is not before the Court, and should not ground.

2. The objection to the verification is not well taken. The verification is in strict accord with Equity Rule 25. The objection, moreover, was waived by not urging it upon the Court below, which would, of course, have permitted, if the verification were found to be defective, an amended verification to be made.

As stated in the recent case of Swayne & Hoyt v. Wells Russell & Co., decided February 8, 1915, S. F. No. 6835, by the Supreme Court of the State of California, and which is reported in the Recorder of February 13th:

“No objection to the form or sufficiency of the affidavit in this respect was made below. If it had been made, the defect could have been immediately cure if the court below had so acquired. (Code Civ. Proc., Sec. 595.) Under these circumstances it must be deemed to have been waived.”

See Inv. Albany W. W. v. Louisville B. Co., *supra*.

CLOSING BRIEF ON BEHALF OF APPELLEE.

PRELIMINARY.

In these cases, we received nine days before the argument, two briefs—one 110 pages, the other 57 pages in length. It was, of course, impossible to reply to them fully before the cases came on to be heard.

Therefore, and especially in view of the fact that in the case of Pack v. Carter, No. 2538, appellants' brief was not received until *one* day before the argument, this brief is filed covering all the cases.

The six cases now on file may be conveniently divided into three classes. First, two of these cases are on appeal from orders refusing to vacate orders granting injunctions and refusing to dissolve injunctions. These are cases Nos. 2539 and 2540. Second, three cases are on appeal from orders granting injunctions, and are Nos. 2535, 2536 and 2537. Third, the last case, No. 2538, Pack v. Carter, which is differently entitled, is an appeal from an order refusing to dissolve a restraining order made prior to the return of the order to show cause. As stated at the oral argument, it is very doubtful if this order is appealable. See Judicial Code, Sec. 129.

It will be observed that the records on these various appeals are different. Thus the motion and affidavit accompanying the motion to dissolve the injunction are not before the Court in the three

cases secondly above mentioned, Nos. 2535, 2536 and 2537; while in the third case, No. 2538, the record embraces only the complaint, the restraining order, and the motion made to dissolve that order, together with the affidavits filed in support thereof.

It will be noted, therefore, in passing, that we were correct in our statement made at the oral argument, that the appellants first rested their case upon the verified bill. They offered no affidavits in response to the order to show cause issued upon the filing of the bill, and the Court, for the reason stated in its opinion, deeming the bill to be sufficient, ordered the issuance of the injunction. Having thus lost, the appellants then came again into Court and for the first time presented affidavits in which they attempted to deny certain of the allegations of the complaint. In the lower court it was stated, and properly stated, that these affidavits should have been presented upon the return day of the order to show cause. The decision below, however, was not rested upon this ground; the motion was denied on its merits.

The position of the appellees on these appeals embraces two points:

1. That the injunctions pendente lite were properly issued upon the verified complaints.
2. That the admissions contained in the affidavits presented by appellants upon their several motions

to dissolve the several injunctions, removed any doubt upon this point.

This point arises in the three cases secondly above mentioned, only, and if correct, it disposes of those cases, and, in addition, inferentially or indirectly at least, of all the cases.

ANSWER TO APPELLANTS' BRIEF.

A very brief answer is all that is necessary to the argument found in appellants' brief.

Referring to their brief in cases Nos. 2539 and 2540, it will be found that their appeal is grounded upon five points (see pp. 36 to 43) which are supposedly applicable to these cases. These points, which are points of law, embrace propositions which are not disputed by us, and which, as we pointed out at the oral argument, are in no wise applicable to these appeals. Let us take up these points in their order.

The first point is as follows (p. 36) :

"An injunction pendente lite must be supported by verified statements, as to essential facts, positive, certain and free from conclusions."

From this it would readily be inferred that an injunction had been granted upon a bill that did not contain verified statements in a positive form.

The answer to this is found by quoting from the opinion of Judge Bledsoe (Case No. 2539) as follows (page 41) :

"The bill in equity as filed contains much matter that seems to be immaterial, much that is purely 'epithetic,' to use an expressive phrase, and a great deal averred upon information and belief, and not positive. *With respect to this latter, the Court feels that it should not, of course, consider it upon this order to show cause,* because of the fact that under the law the complainant, to be entitled to positive relief at this juncture, and in advance of a hearing, must base his request for such relief upon positive allegations. Laying out of consideration, however, the matters referred to above, it may be said, *that certain facts are stated with such positiveness and cogency as that they fall within the realm of indispute upon this hearing.*"

The Judge then summarizes the positive allegations of the bill, and concludes that these positive allegations warrant an injunction.

The second point urged by counsel is as follows (p. 38):

"Where a court's action in granting an injunction pendente lite is based upon a verified statement of facts a material one of which is not only uncertain, but is on information and belief, and not positive, such action rests upon an erroneous hypothesis of pertinent facts."

Here again it is to be inferred that an injunction was grounded upon a bill containing allegations made upon information and belief. The quotation from Judge Bledsoe's opinion given *supra*, however, disposes of this contention.

The third point urged by counsel is as follows (p. 40) :

“Asserted equity in a verified bill, stated in terms sufficient to justify the affirmative use of the court’s discretion on motion for injunction pendente lite, is overcome, on motion to dissolve such injunction, by affidavits supporting the motion which contain positive, clear, and unequivocal denials of material allegations in the bill. Particularly is this true where material allegations in the bill are defective for want of positive averment, as well as for want of clearness, or because made up of the conclusions of the pleader.”

The answer to this point will be more particularly shown *infra*. In passing, however, it may be said that there are no positive, clear or unequivocal denials of *all* the material allegations of the bill, but, on the contrary, certain definite admissions are made. Not alone were these admissions made, but the rule itself, referred to by counsel, is one going to the extent of holding that *all of the equity* of the bill must be denied. Now, the appellants themselves, claiming as they do *through the same source of title as the complainant claims*, could not deny all the equity of the bill without stating themselves out of court.

The fourth point urged by counsel is as follows (p. 42) :

“Where asserted equity in a bill is wholly overcome by contradictory affidavits on motion to dissolve an injunction, it is an improvident exercise of a court’s legal discretion to deny dissolution.”

The answer to point three is applicable here, for the affidavits so far from wholly overcoming the allegations of the bill, as we have previously pointed out, admit the essential allegations thereof, *insofar as the question of the right to an injunction is concerned.*

The fifth point urged by counsel is as follows (p. 41) :

“There has been reversible error where a court in granting or continuing an injunction pendente lite—

- (a) Has relied upon an erroneous hypothesis of pertinent facts, or—
- (b) Has relied upon an erroneous hypothesis of pertinent law, or—
- (c) Has improvidently exercised its legal discretion.”

This point is urged as if it were a proposition peculiarly applicable to this case. It is merely stating the proposition that where a lower court has committed an error of law, an appellate court will correct that error upon appeal. This point of law, of course, arises in every case, and, to be of any value here, must be taken upon the predicate that the

decision below is incorrect, which is to assume the point at issue.

It is quite apparent, therefore, that the entire case of the appellants here rests upon propositions of law that nobody disputes, but none of which is applicable to the facts of this case; and this being so, it is apparent, without any further discussion of the record, that there is no ground whatever for the appeals here, and that the orders appealed from should be affirmed.

These preliminary points being out of the way, the following is devoted to an abbreviated discussion of the points urged by us at the oral argument and referred to *supra*.

I.

BRIEF OF ARGUMENT.

THE VERIFIED COMPLAINTS FULLY WARRANT THE INJUNCTIONS PENDENTE LITE.

The injunctions were properly granted upon several grounds, among which we specify as follows:

1. The bill seeks to prevent a cloud upon title.

It will be conceded that where equity will interpose to remove a cloud upon title, it will, by injunction, prevent the casting of a cloud. The authorities cited in our former brief on this point are conclusive. (Appellant's Brief, p. 7.)

By Sec. 2324 of the Revised Statutes of the United States it is provided that where one co-locater of a mining claim fails to contribute his proportion of the assessment work, for any given year, his co-locater who has performed the labor or made the improvements, may, *at the expiration of the year*, forfeit his interest by giving him the notice therein specified.

“If” says the statute, “at the expiration of ninety days after such notice in writing, or by publication, such delinquent shall fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.”

The right of forfeiture for failure to contribute his proportion of the expenditures made by a co-owner is given by this statute and by this statute alone. It does not give the right to a forfeiture where these expenditures have not been made and it surely does not give the right of forfeiture if the owner had moneys belonging to his co-owners with which to do the work. And the important point is, that the forfeiture exists by virtue of the Federal Statute only.

The cloud that is sought to be cast upon the title of the co-owner here results from Sec. 1426-0 of the Civil Code of this State. This section provides that when the co-owner has given the notice required by Sec. 2324, Revised Statutes, an affidavit of service may be attached to such notice, and both may be

recorded in the office of the County Recorder where the property is situate within ninety days after the giving of the notice. The section then provides:

“The original of such notice and affidavit, or a duly certified copy of the record thereof, *shall be prima facie evidence that the delinquent mentioned in Sec. 2324 has failed or refused to contribute his proportion of the expenditure required by that section, and of the service of publication of said notice*”

In a subsequent part of the section it is provided that if the co-owner shall contribute his pro rata of the expenditures, and “*also all costs of service of the notice required by this section,*” the other owner shall deliver a writing to that effect, under a penalty if not done. If he shall refuse to do so, the delinquent, with two disinterested persons who have personal knowledge of the contribution, shall make an affidavit of the fact, which shall be *prima facie evidence of such contribution.*

The cloud which is cast upon the title of the co-owner by virtue of the recording of this notice and affidavit, is plain. *By virtue of the statute, the burden of proof has been shifted, and the recording of such affidavit and notice makes out a prima facie case that the work has been done.*

Now, the injunction in this case is to prevent the creation of this cloud upon the title, for the following reasons:

(a) The appellant Pack did not pay for the work during the years 1911 and 1912, as alleged. It would be a singular thing to permit the creation of this cloud upon the title of the appellee,—the cloud going to the extent of making out a *prima facie* case against him,—when, in point of fact, the work for which contribution was sought, had not been paid for.

The opinion of the lower Court on this point is, we think, all that it necessary to cite (p. 42, No. 2539) :

“Plaintiff then alleges that the said Pack did not expend, or cause to be expended, of his own money, during the years 1911 and 1912, or at any other time, the sum of \$5,600, of which the said \$700 was the one-eighth part, upon or for the benefit of said placer mining claims, or at all.”

And further (p. 43) :

“At this time the Court must assume them (meaning the allegations) to be true, because no affidavit or answer in opposition to or in explanation of them, has been presented by the defendants.”

And the rule the court then announced would appear to be indisputable (p. 43) :

“It would appear that the defendants have no right to claim or exact a forfeiture, as

against the plaintiff, for his failure to contribute his share of the assessment work, and that the proceedings on the part of the defendants, leading up to the service of the notice of forfeiture, and in the recording thereof, are substantially a nullity, insofar as they seem to have effected a divestiture of plaintiff's undivided interest in and to the mining property in question."

(b) The second ground for the injunction seeking to prevent the casting of this cloud arises from the fact that at least \$2,836 was contributed by the plaintiff and his co-locators to the appellees with which to do the assessment work. The allegation of the bill of complaint in this regard was distinct and positive, and it was, of course, binding upon the lower Court when no affidavit or answer in opposition thereto was made. It is not necessary to cite authority to the point that a court of equity will restrain a party from declaring a forfeiture against another because of the non-payment of moneys, when the former had moneys belonging to the latter with which to make the payment.

The following, in those cases in which an affidavit was filed, appears to be the facts with respect to this contribution, from the defendant's own standpoint:

(Case No. 2540, p. 71.)

"That affiant alleges that the sum of \$1,000 [erroneously printed \$100 in the record] alleged in said Bill of Complaint to have been paid by

one Henry E. Lee as the agent and representative of complainant and his co-locators to affiant for complainant and his co-locaters, was actually paid to affiant on or about the 18th day of January, 1912, that at the time said sum was so paid to affiant, said Lee was indebted to affiant in a large sum, to wit, a sum in excess of \$1,000, that affiant elected to and did treat said payment of said \$1,000 as a payment on account of said indebtedness of said Lee to affiant, that affiant does now [erroneously printed not in the record] elect to so treat said payment of said \$1,000 as a payment on account of the indebtedness of said Lee to affiant; that said sum of \$1,000 was not advanced for or on behalf of the complainant and his co-locators herein or any or either of them, but, so far as this affiant knows and to the best of his knowledge and belief, solely on behalf of said Lee himself.”

Here we have an admission that a thousand dollars of the \$2,836 referred to, was paid. The excuse offered is that at the time the contributor was indebted to the appellee in a greater sum than a thousand dollars; that he elected to and did treat this payment of a thousand dollars as a payment on account of that indebtedness, and

“that affiant does *now* elect to so treat said payment of said \$1,000 as a payment on account of the indebtedness of said Lee to affiant.”

The fact that the affidavit alleges “that affiant does *now* elect to treat said payment as a payment

on account of said indebtedness," removes any question as to its application in satisfaction of the alleged indebtedness *at the time it was made*, with the knowledge of the appellee; and the failure to notify the contributor at the time the thousand dollars was paid that it would be applied on account of this indebtedness, and not for the purpose for which it was given, was, of course, a fraud. If, for example, one of two persons holding a mining claim contributed to his co-locater a sum of money with which to do the assessment work, the contributee could not as was held in the Court below, appropriate this money for any other purpose, unless at the time he received it he notified him that he intended to do so. Such moneys, when given for such a purpose, must be appropriated to that purpose. The affidavit here is barren of any allegation or assertion that when this thousand dollars was paid, the appellant notified Lee that he intended to apply it upon account of his personal indebtedness, and would not use it for the purpose for which Lee gave it, and the fact that the affidavit states that the affiant "does now," after suit brought, seek to so apply it, removes this question from any doubt.

As to the balance of \$2,836, the sum of \$1,836, the facts are equally clear. The affidavit of appellant Pack in case No. 2540 is not complete on this subject; and in order to ascertain the exact facts, the record in Pack v. Carter, No. 2538, pages 93 to 95,

must be examined. From these affidavits it will appear that prior to the month of December, 1911, Henry E. Lee asked affiant to endorse his note, in order that he, Lee, might obtain a loan. This request Pack refused. Thereupon Lee requested him to give him a written acknowledgment of indebtedness, in order that he might obtain a loan on his own promissory note, to be secured, however, by an assignment of said written acknowledgment; that he requested this written acknowledgment of indebtedness to be given in an odd sum, in order that a possible lender might not suspect that the same had been given as an accommodation:

“That affiant acceded to the said request of said Lee, and gave said Lee a written acknowledgment of indebtedness in the sum of \$1,836, *for the purpose of enabling said Lee to repay affiant the amount of said Lee's indebtedness to affiant*; that affiant received no consideration for the said written acknowledgment, either past or present; that said Lee was unable to procure a loan on the security of said written acknowledgment; that the same has never been negotiated, and is wholly without consideration of any kind whatsoever or at all.”

(p. 94, 95 Pack v. Carter, No. 2538.)

In Pack v. Thompson, No. 2540, the facts in regard to this same matter are stated in a somewhat different form, as follows:

“That affiant acceded to the said requests of said Lee and gave Lee a written acknowledg-

ment of indebtedness in the form of an '*I. O. U.*' for the sum of \$1,836, for the purpose of enabling said Lee to repay affiant the amount of said Lee's indebtedness to affiant."

From these facts it appears that Lee was indebted to affiant, and that the *I. O. U.* referred to was given to him for the purpose of enabling him, Lee, to borrow money with which to repay that indebtedness.

This makes the situation very clear. Pack acknowledged, in the form of an *I. O. U.*, the indebtedness to Lee in the sum of \$1,836; he admits that that evidence of indebtedness is outstanding; he alleges a want of consideration. Upon whom rests the burden of proof? Obviously upon Pack. *Had Lee, for example, sued upon the I.O.U., the production of the written instrument would make out his case, and if the defendant offered no further evidence, judgment would follow in his favor.*

This being the situation, the balance of proof is clearly in favor of the appellee; and the rules with respect to injunctions require that the cause should be determined according to the balance of proof. It will be noted in passing, that from appellant's own affidavit, a consideration for the instrument is shown; for it is alleged that this *I. O. U.* was given in order that Lee might borrow money to repay an alleged indebtedness to appellant. Obviously, as between Lee and Pack, there was a consideration for this instrument. It is alleged that Lee did not obtain the money.

Nothing in the affidavit discloses that he is not rightfully in possession of this instrument now, or that he has not the right still to borrow money upon it, or that the time for his performance under the agreement between them has elapsed.

2. An injunction pendente lite was properly granted in this case to prevent a multiplicity of suits.

This ground was set forth so clearly in our first brief on pages 8 to 9, upon the authority of McConaughey v. Penoyer, 43 Fed. 339, that any further discussion of it here is deemed unnecessary.

(Appellee's Brief, p. 8.)

3. The accounting feature clearly warranted the granting of the injunctions.

This matter was likewise fully discussed on pages 14 et seq. of our opening brief, but something further on the subject may not be inappropriate.

By turning to the bill in case No. 2535, it will appear that the plaintiff alleges that Pack did not expend, during the years 1911 and 1912, the \$5,600 therein referred to (p. 10), and that he did not expend, during either of those years, the sum of \$100 upon each or upon all of the claims referred to. It will further appear that the notice of forfeiture (p. 41) did not in any way describe the character or nature of the pretended labor or improvements claimed to have been done, and that the plaintiff is

unable to ascertain definite information on that subject.

The complaint then alleges (p. 12) :

"That plaintiff is unable to ascertain from said pretended Notice of Forfeiture whether the said defendant Pack claims to have actually expended, of his own money or funds, in labor and improvements, or in labor or improvements, upon each of said placer mining claims, the said sum of \$100.00, or the sum of \$5,600.00 upon all of them, or any other sum or amount, or *whether the said defendant Pack claims to have expended such money in the transportation of men and supplies to Searles Borax Lake for the purpose of having done upon each and all of said placer mining claims the annual representation work for the years 1911 and 1912*; that plaintiff cannot ascertain from the said pretended Notice of Forfeiture whether the amounts claimed to have been expended by said defendant Pack of his own money or funds upon said placer mining claims, or upon any of them, if he ever expended any money at all thereon, was the value of \$100.00 for each claim, or of the value of \$5,600.00 for all, or whether such labor and improvements, or labor or improvements increased the value of each of said claims in the sum of \$100.00, or the value of them all in the sum of \$5,600.00, or whether said pretended labor and improvements, or labor or improvements tended in any way to develop any or all of said placer mining claims, or increased or aided in availability for taking ores or minerals from said claims, or from any of them; that this

plaintiff further alleges upon information and belief that the said defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said placer mining claims, or any of them, for the years 1911 and 1912, expended a greater part or portion, or all of such money, *in the transportation of men and supplies to Searles Borax Lake, San Bernardino County, California, where said placer mining claims are located, as aforesaid,* and in furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported to said Searles Borax Lake for the purpose of performing said representation work during said year upon said claims."

The affidavit of Pack in this regard does not contradict these allegations, but contains an admission of such importance that, although already quoted in our former brief, we deem advisable to quote again.

On page 64 of the record, Pack v. Thompson, No. 2540, the appellant Pack says:

"Affiant alleges and affirms that he did pay out and expended of his own moneys during the year 1912 the sum of \$4,400 in connection with *and for the purpose of procuring the performance of the annual labor upon the said forty-four placer mining claims hereinbefore referred to* and more fully described in the Bill of Complaint on file herein, which said sum affiant believes should be properly charged against and constitute a part of the value of, the annual assessment work for the year 1912 and which said sum affiant believes should be repaid and

contributed to him by his said co-locators and that complainant herein should reimburse affiant for one-eighth of said sum."

Here is an admission by a failure to deny the allegation of the complaint that a portion of this \$4,400 was for the transportation of men and supplies to Searles Borax Lake for the purpose of having the work done. And the counter affirmative statement is made, that the affiant *believes* that work and labor performed *not* on the property, should be charged up to his co-locater. It is, of course, well settled law that the only amount which a locator can exact from his co-locater for contribution, is for *work actually done or improvements actually made on the property*, and that this does not include the cost of transporting men. See Lindley on Mines, sec. 629, 3rd Ed.

This being the case, we have, upon the admissions of the complaint and affidavits, the right to an accounting; and we also know that there is included within the amount for which the forfeiture is claimed, an amount for which the appellant has no right to a contribution from the appellee.

It is a general rule that courts not only abhor a forfeiture, but this rule has particular application with respect to proceedings under the mining law. Thus, Lindley on Mines, Vol. 2, p. 1622, says:

"The courts, however, hold that the statute is one of forfeiture, and should be strictly construed.

In order, therefore, that the interest of a co-tenant may be forfeited it is essential—

1. That the relationship of co-tenancy exist.
2. *That the entire work shall have been performed by one or more of the contenant.*
3. That the delinquent co-tenant or his successors in estate has failed to contribute his proportion after service of personal notice by publication, as required by law.”

And in *Knickerbocker v. Halla*, 177 Fed. 172, Judge Gilbert, speaking for this Court, said:

“First. The proceedings to forfeit the interest of the plaintiff in error and that of Lapiana were based upon their failure to contribute to the annual assessment work for the year 1902, done upon the claim by Webb, together with his partners, Butler and Ewing. Prior to December 16, 1902, Webb had no interest in the claim. On that date Halla executed to him a deed of an undivided one-sixteenth interest; the consideration therefor being the use by Halla of a cabin belonging to Webb, and the promise of Webb to Halla to do the assessment work on that claim and certain other claims for the year 1902. In pursuance of that contract, Webb and his partners, after December 16, 1902, performed the work. It is clear that the performance of the work under the agreement gave Webb no right to claim forfeiture as against any of the owners for failure to contribute to the expense thereof. He was fully paid by Halla for his work. He

was hired by Halla to do the work, and the conveyance which Halla made was his pay. Halla, having caused the work to be done, and having paid therefor, had the right to claim contribution and give notice of forfeiture; but neither Webb nor his partners had any such right."

II.

THE CLOUD UPON APPELLEE'S TITLE IS AGGRAVATED BY THE SHIFTING OF THE BURDEN OF PROOF SOUGHT TO BE EFFECTED BY THE CALIFORNIA LAW.

It will be noted that under the Federal Statute the burden of proof rests upon the co-locater seeking to forfeit out his adversary, to prove his case, and it will be further noted that this burden of proof properly rests there, for the reason that the law abhors a forfeiture. The effect of the California statute, however, is to shift this burden of proof to the other party.

Waiving for a moment the legality of the statute in this connection, it will be seen that this places the appellee in a very disadvantageous position. The recording of the notice and the affidavit makes out, under the California statute, a *prima facie* case; whereas, under the Federal statute, the burden of proof would rest upon the proven claim of the appellant. See Hammer v. Garfield M. & M. Co., 130 U. S. 291; Harris v. Kellogg, 117 Cal. 484-489. This

prima facie case could only be overcome by proof, and therefore, as held by Judge Field in the case quoted from by Judge Bledsoe (record, 2540, p. 47), a bill to restrain the creation of a cloud upon title is eminently proper.

Moreover, the State statute, in some respects, conflicts with the Federal law. Thus, the Federal law, which alone gives rise to the forfeiture, states that the money must be paid at the *expiration* of ninety days; the State law requires it to be paid within ninety days.

The aggravated character of this cloud upon the title is further illustrated by the fact that the California statute shifts the burden of proof upon the filing of an unverified statement in the Recorder's Office. Neither perjury, nor any other legal consequences of false statement in this regard, flow from it; the only legal consequence flowing from the recording of an unverified statement in the Recorder's Office is, that the adverse party is bound to pay the demanded sum of money, or be forfeited out.

When, therefore, it appears, as here, that (a) some of the money claimed to have been expended was not expended on the mining claims at all; (b) that a thousand dollars of the co-locaters money was in the hands of the forfeiting claimant with which to do the work, and (c) that another sum of money is admittedly due from the co-locater to his adversary for the purpose of being applied towards the contri-

bution, it is too plain for argument that a court of equity should and will restrain the creation of this cloud upon title.

The question propounded by the Presiding Judge to counsel at the oral argument is an apt illustration in this connection. If we are not entitled to this measure of relief, what relief have we? *Is there any rule of law that requires us to pay money that we do not owe?* Is it a plain, speedy and adequate remedy at law for one who, for that matter, may not have the money, to be compelled to pay to his adversary, *money that he does not owe*, with the privilege of recovering it back, as claimed by counsel at the oral argument? Has a court of equity no right to stop the imposition of a forfeiture for the non-payment of money, when the money in fact was not due or owing? These questions seem to us to answer themselves.

III.

THE AFFIDAVITS PRESENTED BY THE MOVING PARTIES SHOW CONCLUSIVELY THAT THE INJUNCTIONS WERE PROPERLY GRANTED, AND THAT THE MOTIONS TO DISSOLVE THEM WERE PROPERLY DENIED.

1. The appellants cite two cases from this circuit to the effect that where the affidavit or the answer deny the allegations of the bill, the restraining order or injunction should be dissolved. In the first case,

Woodside v. Tonopah & Goldfield Railroad Co., 184 Fed. 358, Judge Morrow refers to a denial of "*all of the equities* of the complaint," and in the second case, City of Sacramento v. Southern Pacific Co., 155 Fed. 1022, Judge Van Fleet notes that the answer, under oath, "denies *all the material allegations* of the bill on which the complainant's asserted equity rests."

These two cases are against appellants' contention, for the reason that the affidavits, as we have shown, do not deny all the equities of the bill, but expressly admit all of the essential equities insofar as the injunction is concerned.

2. The appellants likewise cite Lucas v. Milliken, 139 Fed. 816. The application of this case is chiefly in point against them; for it is there said:

"The general authority of courts of equity to grant injunctions pendente lite to preserve the subject of the controversy until opportunity is given for full investigation, is a power in aid of justice, and most beneficial."

If the *status quo* here is not preserved pending the determination of the main issue, it will be observed that the appellants will change it greatly to the disadvantage of the appellees, and in such way as to greatly interfere with the right of the Court to enforce that equity, which, in the fact of the rec-

ord, the complainant is entitled to preserve. This itself would warrant the granting of the injunction. Moreover, the rule is well established that the Circuit Court of Appeals will rarely, in advance of a final hearing, review the exercise of the lower Court's discretion in granting or refusing an injunction; nor will it review the lower Court's determination of any question arising upon conflicting affidavits; and rarely will it disturb the status quo until final hearing. See the cases cited in 1 Foster's Fed. Prac., sec. 238, p. 762-3 (4th Ed.).

3. At the hearing some comment was made upon the affidavits presented in the case. We have already referred to certain admissions found in these affidavits, which are conclusive, and in favor of the complaint. There were, however, one or two matters briefly referred to at the argument, and which will be briefly referred to here.

(a) If we turn to the record in Case No. 2540, *Pack v. Thompson*, we shall find that S. Schuler, the assignor of the appellant Joseph K. Hutchinson admits (p. 74), that on or about the 25th day of December, 1913, she made a deed of conveyance to one J. A. Shellito of all her interest in and to the claims. This deed, she says, was

"not to be delivered to the grantee named therein, until certain conditions to be performed by the said grantee named therein, for and on

behalf of affiant, had been fully performed; that many of such conditions were impossible of fulfillment and performance within a period of many months after the date of said deed; that other of the said conditions were to be performed and fulfilled by the said Shellito in favor and on behalf of affiant immediately upon the signing and acknowledgment of said deed."

(pp. 74-75.)

She then refers to the fact that this deed was to be placed in the hands of the Security Trust & Savings Bank,

"upon the fulfillment and performance of all said conditions . . . None of the conditions which were conditions precedent to the delivery by the said Security Trust & Savings Bank as escrow holder for affiant of said deed, has ever been fulfilled or performed by Shellito, or any other person, whomsoever."

(p. 75.)

None of these conditions is specified, why they were impossible of fulfillment or performance, or within what period of time it would be so impossible to fulfill or perform them, is not stated; what the other conditions were that were to be performed and fulfilled, upon the execution and acknowledgement of the deed, what the terms of the escrow were upon which the deed was placed in the Security Trust & Savings Bank, are not stated.

Obviously, the sworn allegations of the grantor of the deed that it was delivered upon certain conditions, that many of these conditions were impossible of performance, that other of the conditions were to be performed, and that none of them was performed, are not binding upon a United States Circuit Court of Appeals.

(b) The affidavit then alleges that on the 14th day of January, 1914 (p. 76), she made, executed and delivered a deed of this same interest, after having made this previous deed to Mr. Shellito, to Joseph K. Hutchinson. She then says as follows (p. 77) :

“That prior to the said execution of the said deed to said Hutchinson, and after the said making, signing and acknowledging of said deed to said Shellito, affiant stated all of the facts of the case to her attorney, one Ezra W. Decoto, Deputy District Attorney of the county of Alameda, state of California, and thereupon and after said statement of all of the facts of the case by affiant to the said Decoto, the said Decoto advised affiant that she could legally, and without liability, or without breach of any duty owed by her to the said Shellito, or to anyone else, make, execute, and acknowledge the said deed to said Hutchinson; that thereafter and in the presence of the said Decoto, and acting upon his advice, the said Schuler made, executed, acknowledged and delivered the said deed to the said Hutchinson;

That at no time prior to the execution and delivery of said deed did affiant tell said Hutchinson, nor did her said attorney tell said Hutchinson, nor did either affiant or her said attorney in any way whatsoever notify the said Hutchinson that affiant had made, signed and acknowledged said deed to said Shellito, prior thereto, and on or about, to wit: the said 25th day of December, 1913, or at any other time, or at all;

That for and in consideration of the said conveyance by affiant to said Hutchinson, and at the time of said conveyance, and as a part thereof, said Hutchinson paid to affiant, and affiant received and accepted from said Hutchinson, a certain sum of money in cash; that said Schuler made and completed said sale to said Hutchinson of her said interest, in good faith, and without intention to, by the said sale, defraud or injure anyone whomsoever."

It is very plain that affiant was troubled in mind at the time she contemplated making this second deed, so much so that she consulted a deputy district attorney. Whether she did this because she was aware of a statute of the State of California which makes it a felony to deed property twice (Penal Code, sec. 533), or whether she pursued this course in order to obtain proper legal advice as to her conduct, is not clear. The candid reader would think it strange that an assistant district attorney, thus consulted upon so important a matter, should permit the execution and delivery of the second deed, delivered as stated *in his presence*, with-

out saying anything whatever to the grantee as to the existence of the prior deed. However this may be, a matter going to the weight of the evidence or the probability of its truth, the real point is, that *the advice of a deputy district attorney given upon an undisclosed set of facts, is not binding upon a United States Circuit Court of Appeals.*

(c) If now the Court will turn to case No. 2538, Pack v. Carter, it will find, beginning on pages 57 to 62, certain telegrams passing between Joseph K. Hutchinson and the administrator of the estate of one of the assignors of the appellee. In this case also, the assignor and his wife had made a deed of his interest prior to his death, which has passed to the appellee. This interest is sought to be acquired, as appears by that affidavit, by the appellant Hutchinson here.

The whole affidavit in this regard, beginning on page 57, to page 62, is worthy, we think, of serious consideration by this Court.

It is therefore respectfully submitted that the orders appealed from should be affirmed.

R. P. Henshall
 H. L. Clayberg
 Mrs. B. Clayberg
 Welles Whitmore

Solicitors for Appellee.

APPENDIX

The following is a copy of Judge Bledsoe's opinion upon the hearing of the motion to dissolve the injunction.

The COURT: I think that every practitioner realizes that when the Court makes an order to show cause why certain relief should not be granted to the other party, on the return day of the order he should show all the cause he may have. That is the purpose of giving him that opportunity. I certainly am not going to encourage a practice which will enable a party to show part of his cause on one day, and then on another day show another cause which he should have shown on the return day. It has a tendency to trespass upon the patience and good nature of the Court, if I may be permitted to indulge in that expression, and I do not believe it is the kind of practice that should be encouraged. That is all I have to say about that, because I assume from the statement made as to the facts of the case, that counsel acted in good faith. He no doubt believed that his objections by way of demurrer, so to speak, to the complaint, were well taken. The Court disagreed with him. That was not unexpected. The Court has to disagree with somebody. And having been thus ill-advised, if I may use that phrase, having been content to meet the order to show cause with an issue of law only, it seems to me they ought to take their medicine, and either appeal, or say that the determination of the only issue tendered was right.

As I stated a moment ago, I have never felt, in my consideration and determination of matters similar to this, that there is a hard and fast rule to the effect that where the equities of the case presented by the Bill of Complaint are absolutely met by equally positive asseverations on the part of the defendant, that the Court would thereby be required to deny any relief in the way of restraint pendente lite. That would be a very persuasive argument to the Court, that no relief should be granted. It would raise considerable doubt as to the ability of the complainant to recover, ultimately. And, in the event of testimony or proof introduced on the part of the defendant equal to that of the complainant, it would be the duty of the Court to find for the defendant, of course. Because, in all these contentions the burden is upon the plaintiff by a preponderance of evidence to make out a case to entitle him to relief, all presumptions being in favor of the defendant, that he has done the things required of him to measure up to the duty enjoined upon him by law. And, in the event that the plaintiff fails by a preponderance of the evidence to show the stronger case, he should fail to recover in obtaining an injunction as well as any other relief. That frequently happens. When it is equally positive on both sides, the Court is compelled to find for the defendant. But I have always felt in the consideration of matters similar to this, that the Court should rather base its definite

conclusion and mold its interlocutory decree on the question of the probability of injury. Is it more probable, considering all the facts of the case, and giving the proofs adduced on each side the weight to which they are entitled—is it more probable that the plaintiff will suffer injury if the status quo is preserved than the defendant? If so, irrespective of the use of a yard stick in determining where the truth lies and basing the judgment on the elasticity which the defendant's conscience may permit him to assume in framing his answers under oath, and instead of using that sort of an arbitrary standard, the Court ought to feel, and this Court always has felt, that it would endeavor to measure the probabilities from the facts. And if the probabilities are that the plaintiff will suffer more injury than the defendant, or that it will be more injurious to the plaintiff than to the defendant, if the status quo is preserved, the Court will make his interlocutory award accordingly.

In this case there will be conflict in the proofs when they are presented. There is a good deal of talk of conspiracy and confederation, and such as that, none of which I take any stock in, because it is not alleged in such a manner as to attract the attention of the Court in that behalf. It does appear, however, as a positive allegation, that the defendant is not entitled, as of right, at this time, under the apparent probabilities, to claim a forfeiture as

against the plaintiff, because of moneys expressly contributed by the defendant, and, if they were so expressly contributed for that purpose I am inclined to believe that the defendant would have no right to elect that they should be used for some other purpose, and particularly in view of the fact that he does not say that he elected at that time, but says he elected that, maybe, day before yesterday. It says: "and affiant elected and did treat said payment," etc. If he intended that in good faith, it should have been communicated to the plaintiff at that time. If a man pays another a sum of money upon a debt that is made up of a number of items running over a long period of time, the payee has a right to elect what item to credit the payment to. But I apprehend that it has not yet been held that if one pays another to whom he is indebted money for a certain definite fixed purpose, wholly disconnected with the indebtedness, that the payee has a right, arbitrarily, to elect to credit that payment upon the indebtedness and refuse to credit it upon the purpose for which it was actually paid and turned over. I know of no such authority, and it does not commend itself to me on reason or principle.

There is some considerable murkiness in the atmosphere with respect to the title to the properties. Who owns them? Who has them in possession? I do not pay very much attention to that; I do not think it is vital here, and there is much of it

in doubt in the Court's mind as to where the truth and justice lie in that respect.

There is sufficient in the case, however, to cause the Court to believe that there is greater probability of injury to the plaintiff from the enforcement of this forfeiture than there could be to the defendant by a restraint of that enforcement. If the filing of this affidavit be enjoined at this time, then there can be no enforcement of the forfeiture upon the record, and the Court, when it comes to try the case, can then decree in whom the title to the property lies. If the defendant is entitled now to a forfeiture under the law, the Court will decree him that forfeiture when it hands down its judgment, and the defendant will not need to file any affidavit. He will have a forfeiture, and that will be embraced in the decision of this Court, which I am frank to say will be of considerable higher standing and integrity and greater in force and efficacy than any affidavit of forfeiture he could file in the recorder's office. It will be a decree that the plaintiffs have forfeited whatever title they had, and that will be determinative of the question of forfeiture and the question of title to the properties here involved. On the other hand, it would not be fair in this proceeding that the plaintiff should be permitted pending the conclusion of the injunction proceedings to convey any title to this property, or in any way, in the event that it should be determined hereafter that defend-

ant was entitled to a forfeiture—that the right then accruing to the defendant in view of that determination should be embarrassed at all by any action or conduct or conveyance, or attempted conveyance, of the property here, which otherwise would be declared to be forfeited.

So, the Court will make this kind of an order. It will deny the motion to vacate the temporary restraining order in the case last coming before the Court, and it will deny the motion to vacate the order for injunction pendente lite heretofore issued, and, as a part of that order, it will enjoin plaintiffs in this case from making, executing, delivering or in any way conveying the title to these properties pending the determination of the case by this Court, and to hold this question absolutely in *statu quo*. An appropriate order will be drafted by complainant's counsel.

Nos. 2535, 2536, 2537, 2538, 2539 and 2540.

IN THE

**United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.**

THOMAS W. PACK, STELLA SCHULER
and JOSEPH K. HUTCHINSON,
Appellants,

vs.

E. THOMPSON,
Appellee.

THOMAS W. PACK, STELLA SCHULER
and JOSEPH K. HUTCHINSON,
Appellants,

vs.

CECIL C. CARTER,
Appellee.

**CLOSING BRIEF ON BEHALF OF
APPELLANTS**

CHARLES W. SLACK,
Alaska Commercial Building, San Francisco, and

JOSEPH K. HUTCHINSON,
First National Bank Building, San Francisco,
Solicitors for Appellant.

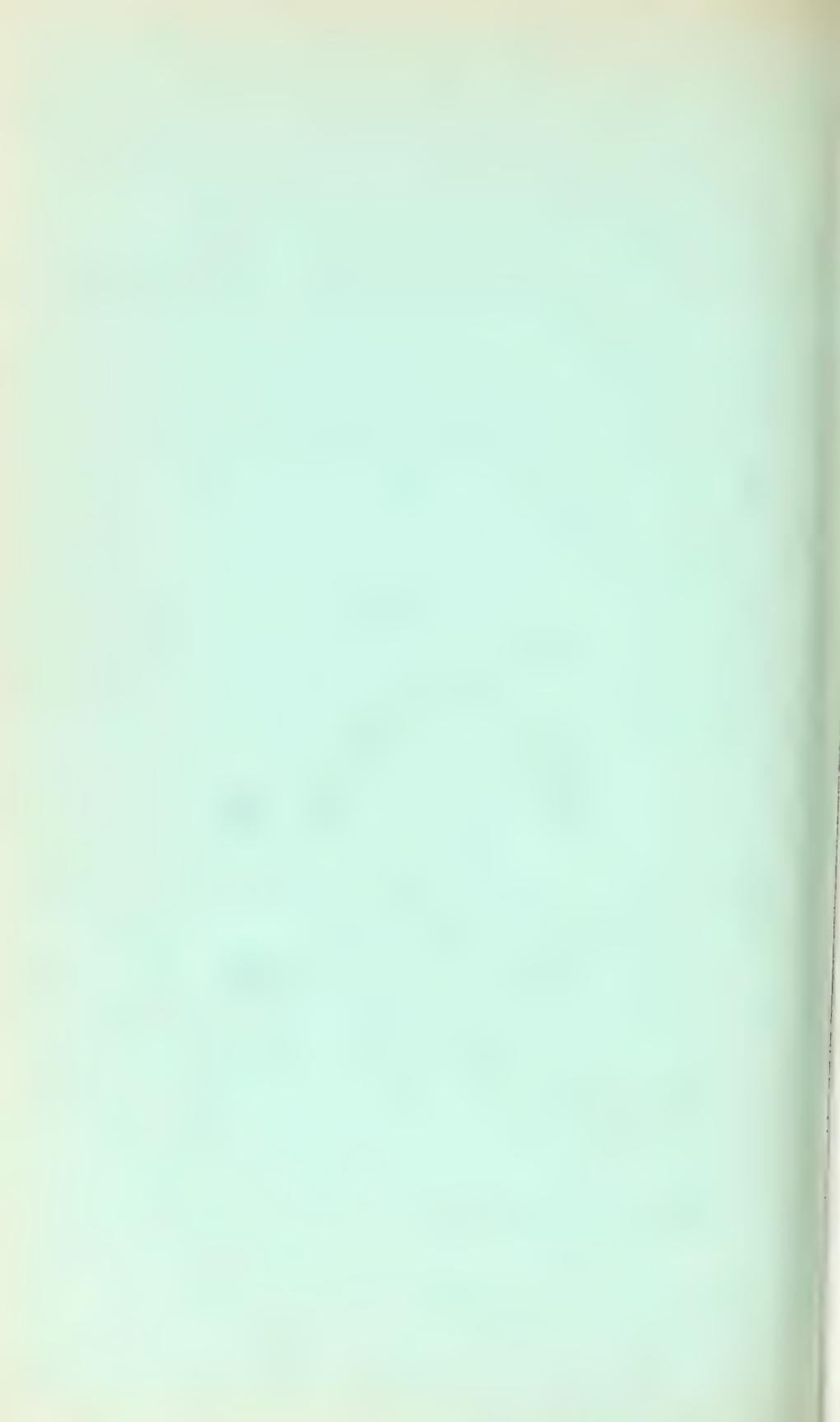
Filed this . . . day of March, A. D. 1915.

F. D. MONCKTON, Clerk.

By Deputy Clerk.

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1915



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Appellee.

CLOSING BRIEF ON BEHALF OF APPELLANTS

It might well have been hoped, during the twenty-nine long days that, following the oral argument of these causes, appellees labored with their supplemental and closing brief, a mouse more veracious, if not more robust, would have been brought forth. As it is, the brief contains statements which cannot bear the cold, white light of fact. It is the purpose to correct these errata at the outset, and before essaying

the more serious task of meeting the arguments advanced.

ERRATA.

First: As explanatory of the somewhat generous allowance of time granted by appellees to themselves in the preparation of their brief, we find (Closing Brief, p. 5) that appellees "received (from appellants) *nine* days before argument, two briefs—one 110 pages, the other 57 pages in length".

The facts are: (1) Subdivision 1 of Rule 24 of this Honorable Court provides: "The counsel for the * * * appellant shall file with the clerk * * * twenty copies of a printed brief and serve upon counsel for * * * appellee one copy thereof, at least ten days before the case is called for argument." (2) One copy of the brief in cases numbered 2539 and 2540, and one copy of the brief in cases numbered 2535, 2536 and 2537, were served on counsel for appellee on Saturday, January 23rd, 1915. (See admissions of service by counsel for appellees on briefs referred to.) These two briefs were the principal briefs, and contained statements of facts, argument, and authorities applicable alike to all of the six appeals. (3) The cases were called for oral argument on February 3rd, 1915.

Second: On page 3 of Appellees' Closing Brief is this language: "* * * no suggestion was made to the Court by counsel for appellants that a bond should be required, and no demand or request for it was ever made to the Court below. Its attention

was not called in any way to the giving of a bond, and it is difficult for us to conceive how error can be charged against the Court below, when the matter, claimed to be erroneous, was not presented to the Court for consideration, and not decided by it."

As none of the learned counsel signing the Appellees' Closing Brief deemed the matter of sufficient importance to warrant their presence at the lengthy argument upon return of the orders to show cause (Tr., Case No. 2539, p. 38), when the orders granting the injunctions *pendente lite* appealed from were made, it is charitable to suppose that they have either been misinformed or only partially informed.

The facts are: Mr. Charles W. Slack, one of appellants' counsel, in concluding both his opening and closing arguments against the sufficiency of the bills to sustain the injunctions (oral arguments made in open court on December 8, 1914), expressly requested and most vigorously urged that, should the District Court rule with the complainants, they be required to give bond in each of the cases.

Third: The same comments may be made as to the following language (Appellees' Closing Brief, p. 4): "The objection (to the verification) was waived by not urging it upon the Court below."

Mr. Slack on his oral arguments above referred to, presented this point to the District Court most forcefully. Moreover, prominent among the points and authorities (pp. 7, 8 and 9 thereof), on the same day handed to Judge Bledsoe and served upon the gentleman representing appellees' counsel, was the

point, supported by numerous authorities, that, to quote the precise language used: "The affidavits to the bills of Henry E. Lee, insofar, at least, as they relate to allegations upon information and belief, are insufficient".

SUBSTANCE OF APPELLEES' BRIEF.

It must be confessed that there are many difficulties in appellees' chief argument (Appellees' Closing Brief, pp. 10 and 11): that appellants' position is indefensible because predicated upon the proposition that the District Court's decision is incorrect!

From this the facile pen of the logician progresses to this conclusion (p. 11): "It is quite apparent, therefore, that the entire case of the appellants here rests upon propositions of law that nobody disputes, but none of which is applicable to the facts of this case; and this being so, it is apparent, without any further discussion of the record, that there is no ground whatever for the appeals here."

Interwoven with this argument, destructive of appellants' case, is found a quota of reasons given as constructive of appellees' case. They are: (1) The bills present proper cases for injunctions to prevent clouds on title (Appellees' Closing Brief, pp. 11 to 20); (2) The bills present proper cases for injunctions to prevent multiplicity of suits (Appellees' Closing Brief, p. 20); (3) "The accounting feature clearly warranted the granting of the injunctions" (Appellees' Closing Brief, pp. 20 to 25). Another

reason, which will be called No. 4, is hardly susceptible of reduction to terms of the commonplace and the understandable. It is, to use appellees' own phrasing: "The cloud upon appellees' title is aggravated by the shifting of the burden of proof sought to be effected by the California law." And, proposition 5 (found under Roman numeral III, Appellees' Closing Brief, p. 27) cannot be put in language more succinct and pointed than that used by appellees: "The affidavits presented by the moving parties show conclusively that the injunctions were properly granted, and that the motions to dissolve them were properly denied."

Beneath this plethora of reasoning will be found the kernel of two contentions upon the correctness of which the appellees' case must of necessity rest. And this result is reached whether appellees insist upon injunctions to prevent a cloud on title, to prevent multiplicity of suits, or as relief incidental to an accounting.

The first of these contentions holds that the District Court in granting the injunctions disregarded the averments in the bill not positive, acted only upon those positive in form, and found these to be sufficient to support the injunctions. The second of these contentions points to the affidavits filed by the appellants on motions to dissolve the injunctions, as admitting expressly and by failure to deny, and as affirmatively alleging enough, relating to the equities essential to support the injunctions, to make it clear that the injunctions were properly granted and motions to dissolve them properly denied.

The first contention is removed from the obscurity of confusion and evasion by reference to pages 7 and 8 of Appellees' Closing Brief. Here are stated one of the appellants' propositions (*i. e.*, that an injunction *pendente lite* must be supported by a verified statement, as to essential facts, positive, certain, and free from conclusions) and appellees' answer thereto. To abbreviate appellees' language somewhat:

"The answer * * * is found by quoting from the opinion of Judge Bledsoe. (Case No. 2539) as follows (page 41): 'Laying out of consideration, however, the matters above referred to (*i. e.*, immaterial and "epithetic" matter, and matter alleged on information and belief and not positively) it may be said that certain facts are stated with such positiveness and cogency as that they fall within the realm of indispute upon this hearing.'

"The Judge then summarizes the positive allegations of the bill, and concludes that these positive allegations warrant an injunction."

It is convincing indeed to argue that appellants have no case on appeal because they assert that the decision of the District Court is incorrect. Equally convincing is this easy argument: The injunctions are beyond criticism because in granting them the District Court said, in effect, "In the opinion of this Court there is sufficient material matter so positively alleged in the bills as to support the injunctions." It is conclusive! The Circuit Court of Appeals is firmly bound to turn deaf ear to the appellants' points of error: the District Court has held those points at naught!

Respectfully it is urged by appellants that the District Court committed reversible error in holding these points at naught.

Appellees turn attention to Judge Bledsoe's opinion upon granting the injunctions. They dwell upon the statements therein that only positive averments are considered. "The Judge then summarizes these positive allegations and concludes that they warrant an injunction." (Appellees' Closing Brief, p. 8.)

It is to this summary that the appellants pointed in their briefs (Appellants' Brief in Cases 2539 and 2540, pp. 48 and 49; Appellants' Brief in Cases 2535 to 2537, pp. 37 and 38) as embodying one of the District Court's errors. In this summary the Court takes as sufficiently before it, as clear, positive and verified testimony in support of complainant's right to an injunction, the two most vital matters of complainant's case: (1) That defendant Pack did not expend or cause to be expended of his own money, during 1911 and 1912, or at any other time, the sums claimed in his Notices of Forfeiture to have been spent by him, and for which contribution from complainant was demanded; (2) that at least \$2836 was contributed by complainant and his co-locators to Pack for the purpose of doing assessment work on the claims for 1911 and 1912.

This is not tantamount to a trial court's finding of fact upon conflicting evidence. No more is it a conclusive determination of any other sort by which the Appellate Court is bound. It is challenged directly and vigorously by the appellants. And as ground

for their objection they turn to the bills of complaint, and ask consideration of the only averments in those bills upon which the District Court could have based its conclusion as to these matters indispensable thereto.

Appellants in their briefs, filed prior to oral argument, took pains to deal at some length with the averments found in the bills, on these points essential to appellees' cases. (See Appellants' Brief in Cases 2539 and 2540, pp. 49-57; Appellants' Brief in Cases 2535 to 2537, pp. 37-47.) Nowhere in any of appellees' briefs are appellants' arguments upon these points met. Rather, discussion by appellees of the averments assailed is studiously avoided. "The District Court said they were sufficient and positive, therefore they are," constitute the only forces rallied by appellees to defend the bills in these all-important respects. (See Appellees' Closing Brief, pp. 8, 12, 14, 15, 16, 23, 26 and 27.)

There are therefore no counter-arguments on these points to be met by appellants. Lengthy discussion approaches repetition of the matter already before the Court in appellants' brief first filed (see references to these briefs, *supra*). One thing is certain, however. If the defendant Pack did not make the expenditures at all or do the work at all claimed in the Notices of Forfeiture, the English language offers to a frank witness seeking to assert those facts in clear and definite terms ample means of removing all obscurity and uncertainty from his statements, and full protection from any charges of evasion or lack

of frankness. How does complainant make use of these means? He does not say "I swear positively that Pack did not spend any money at all; I swear positively that Pack did not do any work at all." Instead, complainant is furtive and cautious. "Pack did not spend any of his own money", asserts the complainant. Whether this be positive or on information and belief, may not be known, for later in his solemn statement to the Court he says, "On information and belief I swear that Pack never expended any money whatsoever." Complainant was dodging something. Was it not the heavy responsibility of the unequivocal statement under oath that Pack did not do any work whatsoever or spend any money whatsoever? If the conclusion is not irresistible, it is so persuasive as to bring suspicion into the eyes of the Chancellor, so wary of those whose stories stumble in the telling.

At this juncture attention is called to the fallacy of the proposition found at the top of page 14, Appellees' Closing Brief: That it is essential that the co-owner seeking to "forfeit out" his delinquent co-owners must have *paid* for the work performed or improvements made by him or caused by him to have been made. While doubtless true that work done by *all* co-owners cannot be used by one, who has not paid all the expenses thereof, as a basis for forfeiture proceedings, yet if one co-owner, individually, does the work, or causes it to be done, thereby rendering himself individually and alone liable to pay therefor, he has as mature a right to

demand contribution under U. S. R. S., Section 2324, from his co-owners, and upon their failure to contribute to "forfeit them out", as though he had fully paid for the work.

Big Three Min. & Mill Co. v. Hamilton, 157 Cal. 130-143;
Lindley on Mines (3d ed.), Vol. 2, Sec. 635,
p. 1579;
Snyder on Mines, Sec. 492.

From this it may be seen that even to definitely negative payment by Pack is not to destroy his right to forfeiture proceedings against complainant. In addition, performance of the work or making of the improvements by Pack must also be negatived.

Surely, had the work not been done at all, a complainant who is so valorously defending his interest in the claims from forfeiture proceedings (instituted more than two years after the performance of the work) would have had sufficient interest in the property to have kept himself informed as to whether or not work had been done thereon by any one. In other words, had the work not been done, it is surely reasonable to expect a flat assertion by complainant to that effect. In its absence is it wholly unreasonable to presume that the work was done—and *not* by complainant?

Moreover, there is for use in just such situations as the present one a rule preserved to the Chancellor through numberless years that "It is to be presumed that plaintiff has stated his case in his complaint as favorably to himself as he can."

Morrison v. Land, Supreme Court State of California, in Bank, March 6, 1915. Sacramento No. 2259.

To peruse Appellees' Closing Brief is to become convinced that even appellees have abandoned the position taken by them on return of the orders to show cause: that the bills show cases for injunction because it appears therefrom that the work was not done. Now it is asserted that (1) the work was not paid for by Pack (Appellees' Closing Brief, p. 14) and (2) that Pack had in his hands \$2836 contributed by complainant and his co-locators towards the performance of the work in 1911 and 1912 (Appellees' Closing Brief, p. 15). Both these propositions presuppose the performance by Pack of the labor.

Another thing is certain. The same ample means of candid and clear expression open to complainant in reference to the alleged nonpayment by Pack for the assessment work, were open to complainant for his statement of the facts as to the alleged contribution of \$2836 by complainant and his co-locators. A single offense against the rules of candor and clearness might possibly be passed over as only a persuasive argument that there had been evasion. The second offense as to so necessary a fact as this matter of contribution would seem beyond all question to deprive complainant of the attentive and indulgent hearing granted to the honest petitioner. Complainant, through affiant Lee, says: \$1000 was paid by said Lee, as agent of complainant, and his co-locators, to Pack as a portion of their pro-rata

contribution for the assessment work for 1911 and 1912. Given its fullest weight, this would amount to a contributory payment by Lee of \$125 for complainant's portion of at least \$800 due for work on twelve claims for 1911, and on 44 claims for 1912. How was this generous and alleged payment to be divided between 1911 work and 1912 work? Was this munificent sum of \$125—sufficient to pay complainant's portion of the assessment for one year on only ten claims—to be distributed equally to ten claims? If so, which ten claims were to be so favored? We do not know these things, nor does complainant, through affiant Lee, who verified the bill and was the very man who paid the money, enlighten us thereon. Truly this \$1000 payment does service in many causes.

But the \$1000 is not the only amount mentioned by complainant. A larger sum, \$1836, goes to make up the \$2836 that, said the District Court in its opinion, was contributed by plaintiff and his co-locators to Pack for the purpose of doing the assessment work for 1911 and 1912 on the claims involved. The actual money in this amount is elusive. When one seeks to lay hands on it one finds that the defendant Pack "duly acknowledged in writing that he was indebted to one Henry E. Lee, the duly authorized agent of plaintiff, and his co-locators, in the sum of \$1836", and that Lee, acting as such agent for plaintiff and his co-locators, directed Pack to use all of said money in the annual representation of the claims. Was Pack really indebted to Lee? There is no

pleading before us from which we can reach that conclusion. There is a statement of an *evidentiary* fact which might, if properly bolstered up with other more important evidentiary facts, lead to such an ultimate fact. But as for the ultimate fact, either the actual payment of money, or an actual indebtedness due and unpaid from Pack to Lee, and rightfully subject to Lee's alleged direction to apply it to the use of complainant and his co-locators—that is to be found only in Judge Bledsoe's opinion and in the erudition of counsel's comprehensive briefs.

With fine discrimination counsel appeals to the rules of *evidence* to sustain their *pleading*. On page 19 of their closing brief, vigorously italicized, we read: "Had Lee, for example, sued upon the I. O. U., the production of the written instrument would make out his case, and if the defendant offered no further evidence, judgment would follow in his favor."

"This makes the situation very clear," as counsel so aptly put it (Appellees' Closing Brief, p. 19).

Grant the far-fetched argument as to rules of evidence, disregarding as it does the danger attendant upon a full examination of Lee and upon an attempt to enforce payment of moneys never owing, and yet the rules of pleading would never permit Lee as plaintiff upon the I. O. U. to even proceed as far as trial in the absence of an allegation of non-payment. Yet, no allegation of non-payment, or of maturity for other reasons, appears in the bills before us.

So much for the props placed by appellees beneath the allegations of the bills standing alone, and already sagging beneath the weakness of their own infirmities. As matters of law, appellees assert (1) that the injunctions were warranted to prevent multiplicity of suits; (2) that the accounting feature warranted the injunction.

MULTIPLICITY.

Both in the Appellants Opening Brief (pp. 81-85, 89-91) and in their oral argument they stressed the circumstances that make it impossible for the appellee effectively to justify the injunction, or its maintenance in force, by his fear of a multiplicity of actions. Not only was he amply protected, under the facts of the instant cases, by the doctrine of *lis pendens*, but in any event his expressed fear was groundless—no suits had multiplied or could multiply; all his rights could be protected, against all comers, in this action. Nevertheless, the appellee has defended the orders appealed from on the ground that a threatened multiplicity of actions existed against which equity properly interposed its buckler (Brief, pp. 6, 8-9), and now again, as also at oral argument, reiterates his reliance upon that ground as a basis for the action of the District Court (Supplemental Brief, p. 20). Yet in all three instances he has cited but one case to the point, one which his counsel, however, has stated to be on “all-fours” with *this* case. The appellants are only too

glad to have this particular decision called to the attention of this Court.

McConaughy v. Pennoyer, 43 Fed. 339.

For the case adds force to the contention of the appellants. A sale actually threatened by state officers of some 50,000 acres of land, which under the law could not be sold "in larger quantities than 320 acres to any one person" (p. 342), was there enjoined. The act enjoined was of such a character that, had it been permitted, a multiplicity of suits must necessarily have followed. As Judge Deady says (p. 342):

"The disposition of this large tract of land in this manner may involve at least 150 sales, to as many different persons. If such sales are allowed to be made, the plaintiff will be compelled, in the assertion and maintenance of his right, to bring a separate suit in equity against each of such purchasers to quiet title or to charge him as a trustee of the legal title for the benefit of the plaintiff, the owner of the equitable estate.

"This presents a very strong case of a multiplicity of suits, that may be prevented by this suit, in which the whole matter may be considered and determined at once, and thus save expense and delay to all persons concerned."

Such is not our case. The act here enjoined did not necessarily bring, or even threaten to bring, some 150 or in fact any concomitant suits in its train. And, even if it had, the *McConaughy* case would be authority only for an injunction against *a sale, pendente lite*, of the property involved, and not for one

against the recordation of an instrument which did not concern third persons and whose validity and effect could be finally determined in this single action. Had the injunction in each of our cases been one inhibiting the appellants from selling, prior to final judgment, the one-eighth interest in the placer mining claims to which both they and the appellee assert a right, Judge Deady's decision might, possibly, be cited to sustain the orders appealed from. As it is, however, the decision is a weak support for the orders actually made in the present instance. In our case it should have been said, as was said by another District Court when asked for an injunction against the creation of a cloud on title, on the ground that such creation would result in a multiplicity of actions:

"There is nothing upon the face of this bill to lead one to the conclusion that there is a multiplicity of suits involved in the pursuit of the legal remedy. We are of the opinion, upon a reading of the bill, that the very reverse is the case, and that the controversy between these parties may be determined in one suit at law."

Richardson v. Pennsylvania Coal Co., 203 Fed. 743, 750.

"* * * A court of equity will not exercise jurisdiction on this particular ground, unless its interference is *clearly necessary* to promote the ends of justice and to shield the plaintiff from a litigation which is *evidently vexatious*. (1 Pom. Eq., Sec. 254.)

"In 1 High on Injunctions (2d ed.), Sec. 61, it is said:

"'Equity will interfere * * * to restrain useless and vexatious litigation * * *'

"The facts asserted in the bill do not warrant a belief that Brown will institute vexatious litigation. See, also, *Boise Co. v. Boise City*, 213 U. S. 276, 286, 29 Sup. Ct. 426, 543 L. Ed. 796; 22 Cyc. 769. It has been well said that:

"'Mere apprehensions or fears on the part of the person seeking relief that the defendant may institute actions against him in the future will not warrant a court of equity in enjoining the bringing of such actions.' 1 High, Injunc., Sec. 64.

"The bill here asserts apprehension on complainant's part, but does not allege threats by Brown."

United Cigarette etc. Co. v. Winston Cigarette etc. Co., 194 Fed. 947, 959 (C. C. A., 4th Circ.).

AS TO RIGHT TO AN ACCOUNTING.

The state in which are found the bills of complaint on which appellees' cases depend renders unnecessary discussion of the question as to whether or not, under proper allegations, equity would take jurisdiction of cases of this character for the purpose of compelling an accounting. Still more unnecessary is a discussion of the question as to whether or not, as incidental to an accounting, equity would, in these instances, sanction injunctions. The bills of complaint are lacking in, not only one, but many of the requisites of a sufficient bill for an accounting. And, no matter what facts might actually exist, failure to present those facts to the court according to well settled rules of equity pleading, deprives the litigant, at least until amendment, of the right to equitable relief in general, and

injunctive relief, in particular. That is to say, the right may exist, but it must be properly asserted before it can be recognized, and prescribed and established remedies for its assertion must be pursued.

As matter of substantive law, and therefore going to the very root of appellees' cases, the bills seem to make indubitably clear the absence of the essential fact that there must be a balance due from the defendants to the complainants. (1 Corpus Juris, p. 639, sec. 87, and numerous cases there cited.) At any rate, there is no allegation of that fact (1 Corpus Juris, p. 635, sec. 104, and numerous cases there cited). Nor can even the vivid imagination or the deft touch of counsel supply the deficiency. Other objections, based upon non-compliance by complainant with the rules of the adjective law, are: No complexity of accounts is shown (1 Corpus Juris, p. 634, sec. 100); no fiduciary relations are shown (1 Corpus Juris, p. 634, sec. 101); no demand for an accounting and refusal to account is shown (1 Corpus Juris, p. 635, sec. 103; also the case of the *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. (C. C. A.) 947, is of value as to all of the above-mentioned points.)

BALANCE OF CONVENIENCE.

We discussed at some length in the appellants' opening brief (pp. 73-91), and again at the oral hearing, the circumstances that the District Court erred in not applying, as a guide to the exercise of its discretion,

the test of the relative inconveniences of the parties, its failure to apply such test being made manifest, we urged, by the fact that it granted and maintained in force, in order to protect asserted rights which were or could have been otherwise adequately protected, an injunction, whose most immediate effect was to impair, or at least to cloud, the rights claimed by the appellants. The appellee has but barely attempted to meet this argument. His present supplemental brief does not touch upon the question. His earlier argument (pp. 10-13) depended solely upon the hypothesis that Section 1426 0 of the Civil Code of California, in providing a limiting period of 90 days within which the required notice and affidavit "must be recorded", was not mandatory, and upon the careless assumption that, if there was any doubt whether or not the provision *was* mandatory, the District Court was justified in casting all the substantial risk of possible litigation and loss upon the appellants. Even though the *statu quo*, as to all parties and rights, could have been preserved by the adoption of another course.

This argument of the appellant was anticipated, and we submit sufficiently met, in our opening brief (pp. 77-8). It was not the province of the Chancellor to act upon the presumption that in preventing compliance by the defendants with the positive terms of a statute he was not affecting their rights, or not affecting them so seriously but what his final decree could repair the injury. He should have permitted such compliance, and his final decree could then have de-

clared whether or not the appellants, by their *completed* forfeiture proceedings, had acquired the appellees' original title. True enough, the Court in its opinion assumes, or is "frank to say", that its final decree, if in favor of the appellants, will be (Supplemental Brief, p. 38):

"Of considerable higher standing and integrity and greater in force and efficacy than any affidavit of forfeiture he (they) could file in the recorder's office."

But what assurance have the appellants that the Court is right on this point and that the final decree *will* have the standing it claims, in the face of the fact that they will not have complied with the apparently mandatory provision of the state statute? Moreover, although the appellee is meanwhile restrained from selling his title, which on the record is clear, what is to prevent him, prior to the actions coming to issue, from dismissing the bill and so disposing of the injunction, selling his interest to third parties, and leaving the appellants where the all-powerful decree of the District Court cannot be made? In spite of all that may be said, whatever risk there is in the situation has been cast upon them.

The following authorities may be added to those already cited by us to the point that the relative inconveniences should always be balanced.

Child v. Douglas, 5 De G., M. & G. 739,
741-2;
Barnard v. Gibson, 7 How. 649, 657-8;
Dun v. Lumbermen's Credit Ass'n, 209 U. S.
20, 23-4;

American etc. Co. v. Eli etc. Co., 76 Fed. 372, 374 (C. C. A., 7th Circ.);
D. & R. G. Co. v. U. S., 124 id. 156, 161 (C. C. A., 8th Circ. Order granting preliminary injunction modified on this ground);
Northern Securities Co. v. Harriman, 134 id. 331, 332, 340-1 (C. C. A., 3rd Circ. Order granting preliminary injunction reversed on this ground. Aff. 197 U. S. 244, 287, 299);
Colorado Eastern R. Co. v. C. B. & Q. R. Co., 141 id. 898 (C. C. A., 8th Circ.);
Mountain Copper Co. v. U. S., 142 id. 625, 638 (C. C. A., 9th Circ. Decree granting final injunction reversed on this ground);
Shannon v. U. S., 160 id. 870, 876 (C. C. A., 9th Circ.);
McCarthy v. Bunker Hill etc. Co., 164 id. 927, 940 (C. C. A., 9th Circ.);
Kryptok Co. v. Stead Lens Co., 190 id. 767, 769 (C. C. A., 8th Circ. Order granting preliminary injunction reversed on this ground. See bottom p. 771).

Also the following recent cases from the various District Courts:

Contra Costa Co. v. Oakland, 165 Fed. 518, 533 (injunction granted, but bond of \$130,000 required, Gilbert, C. J.);
Spring Valley v. San Francisco, 165 id. 667, 710-3 (injunction granted, but on terms, Farrington, D. J.);
Bliss v. Anaconda C. M. Co., 167 id. 342, 366 (injunction refused, Hunt, D. J.);
Pacific etc. Co. v. Los Angeles, 192 id. 1009, 1010 (temporary injunction granted, but bond required, Wellborn, D. J.);
Gillette Safety Razor Co. v. Durham Duplex Razor Co., 197 id. 574, 576;
Wilmington City Ry. Co. v. Taylor, 198 id. 159, 197-8;

Carlisle v. Smith, 200 id. 268, 269;
Cubbins v. Mississippi etc. Commission, 204
 id. 299, 307;
South & North etc. Co. v. R. R. Commission,
 210 id. 465, 483.

The test is also applied, of course, by the Courts of this State:

Hicks v. Compton, 18 Cal. 206, 210;
Real Del Monte etc. Co. v. Pond etc. Co., 23
 id. 83, 84-5;
Paige v. Akins, 112 id. 401, 412;
Williams v. Los Angeles Ry. Co., 150 id. 592,
 596;
Willis v. Lauridson, 161 id. 106, 117.

Valuable notes on the importance of the "comparative injury" test may be found in

14 Am. & Eng. Ann. Cases, p. 19; 26 id., p. 248; 31 L. R. A., N. S. 881; 39 id. 3 (Note to *Kryptok Co. v. Stead Lens Co.*, 190 Fed. 767).

See, also, Chief Justice Bean, in reversing orders granting temporary and permanent injunctions, in the case of

Mann v. Parker, 48 Ore. 321, 325; 86 Pac. 598, 599.

DOCTRINE OF LIS PENDENS.

One or two authorities may be added to those cited in our opening brief to the effect that where a notice of *lis pendens* will protect a party an injunction should not issue.

"Upon the showing made, the question here presented is whether plaintiff is entitled to injunctive relief and the appointment of a receiver. The *mining claims* are made a subject of the litigation, being specifically described in the complaint. *Whoever deals with such claims must deal with them with notice and knowledge of the suit pending concerning them, and it is not apparent how plaintiff's rights as to these can be affected to his detriment.* So it would seem that there is no need of an injunction or of a receiver for the protection of plaintiff's rights therein." (Italics ours.)

Greenberg v. Lesamis, 203 Fed. 678 (C. C. A., 9th Circ.)

In a New York City case Chief Justice Barbour, reversing the lower Court, said:

"The filing of a *lis pendens* notice will more effectually preserve the equitable interest which the plaintiff may have in the lands themselves against a sale and conveyance by the defendants, than would an injunction restraining the owners in fee from selling the same; inasmuch as the former would be, in law, a notice to every purchaser, however innocent, while the latter would not. As, then, the interests of the plaintiff in the lands could have been fully protected by the filing of a *lis pendens*, it follows that an order enjoining the defendants and appointing a receiver was unnecessary, and, therefore, improper."

Gregory v. Gregory, 1 J. E. S. (33 N.Y. Superior) 1, 34 (Jones, J., concurring, p. 38).

The same principle is applied where the title to intangible personal property, such as shares of a corporation, is involved. In a recent New Jersey case

brought by a corporation against the legatees of a testator to obtain a decree that certain stock, ostensibly his, had been held by him as trustee for the corporation, a preliminary injunction was sought restraining the legatees from disposing of the stock. The Chancellor held such relief was unnecessary, under the doctrine of *lis pendens*, saying:

“There still remains the question whether there is in this case such facts as show a reasonable apprehension of danger of loss or injury to the rights claimed by the complainant if the defendants be not enjoined from transferring their shares. The affidavits of Mrs. Taylor and her son disclaim an intention to dispose of their shares, and seem to be as full and fair in this respect as though stated in an answer. In addition, it seems clear that if this principle be correct and applicable here, the effect of it would be, *in view of the pendency of this bill* and of the facts adduced in it, the shares would still be impressed with the trust claimed, *and any one taking them from the present holders would take with notice of any existing rights of the company respecting them.* Therefore, there is no need for the protection of the injunctive power of this Court, which should, of course, be exercised with caution.” * * *

“It seems clear that the same reasons for declining to enjoin the disposition by Mrs. Taylor and her son of their shares of stock apply to the similar relief sought respecting the shares held by Parsons. If the shares of Franklin Taylor were impressed with the trust, and remained so impressed in the hands of Mrs. Taylor, then if Parsons has not fully paid for the shares which he got from Mrs. Taylor, they may be still so impressed, except as to the amount he paid therefor prior to notice. There is, as to these shares, also

an absence of a threatened danger of a change of their status which would be likely to injure the complainant, or defeat the rights which it asserts in the bill and the amendments thereto.

"On the whole, then, after considering with care the many affidavits (but without reviewing them) and the contentions, it seems clear that *the complainant does not need the protection of the preliminary injunction sought* for any of the reasons urged, and, therefore, is not now entitled to it." (Italics ours.)

American Vulcanized Fibre Co. v. Taylor et al. (N. J.), Eq. 1913, 87 Atl. 1025, 1027.

To the same effect are many other authorities:

Edwards v. Banksmit, 35 Ga. 213;

Powell v. Quinn, 49 id. 529;

Matthews v. Cody, 60 id. 357;

Bell v. Sappington, 111 id. 391, 395; 36 S. E. 780;

Tabb v. Williams, 4 Jones Eq. (N. C.) 352;

Livingston v. Hallenbeck, 3 How. Prac. 343, 349.

Mills v. Mills, 21 How. Prac. 437;

Stevenson v. Fayerweather, 21 How. Prac. 449;

Mariposa Co. v. Garrison, 26 How. Prac. 448, 449;

Fitzgerald v. Deshler, 23 J. & S. (55 N. Y. Superior) 91; 18 St. Rep. 866;

Van Rensallaer v. Kidd, 4 Barb. 17, 19;

Waddell v. Bruen, 4 Edw. Ch. 671;

1 Spelling on Injunctions (2d ed.), Sec. 195;

Bennett on Lis Pendens, Sec. 146.

THE CASES IN THE LIGHT OF DEFENDANTS' AFFIDAVITS.

Appellees dwell at length upon what they are moved to call the damaging admissions to be found in

the affidavits filed by defendants and appellants on their motions to dissolve the injunctions. Heavy hand is laid particularly upon Pack's allegations with reference to the all-important "payments" of \$1000 and \$1836.

On page 16 of Appellees' Closing Brief, after referring to the transcript in case 2540, page 71, we find: "Here we have an admission that a thousand dollars of the \$2836 referred to was paid." This may be granted, but there are other facts alleged of which due notice should be taken. First, as to case 2540, involving 44 claims, the statement, as to the receipt by him of \$1000 in January, 1912, is coupled by Pack with assertions that the money was not paid for or on behalf of complainant and his co-locators, or any or either of them, but, to the best of Pack's knowledge and belief, solely on behalf of Lee (Tr., case 2540, p. 72), the omnipresent champion of complainant's rights. Significant also is the positive assertion (Tr., case 2540, p. 70) that Pack has never been indebted to complainant or his co-locators, or any or either of them, or to Lee, in any sum whatsoever. And the averments, clear and positive as to Lee's indebtedness to Pack, cannot be entirely passed over. Even grant that the \$1000 was paid on behalf of complainant and his co-locators and it appears (Tr., case 2540, pp. 63 and 64) that this very Pack, in 1910, paid out of his own pocket every expense of locating these claims in which complainant asserts an interest, and that no part whatsoever of any of these expenses has ever been repaid to Pack by complainant. Nor is there

aught to show, to go still further, that Pack has not credited to the complaint the latter's full proportion of the \$1000, and naught to show that, despite such credit, Pack does not still find complainant delinquent as to the amount named in the Notices of Forfeiture. Lastly, to give complainant's assertions their greatest weight, the insignificance of the amount, in relation to Pack's claims, to which complainant would be entitled to credit out of the \$1000 has already been commented upon hereinabove.

In any event as to case 2539, Pack's affidavit, involving 12 claims, as to the \$1000, exhibits a material difference from that in case 2540. In case 2539, Pack positively avers that the money was paid, not in 1911, but in January, 1912; positively denies that it was paid by Lee as the agent of complainant; denies that it was ever paid by Lee for the purpose of doing work for 1911 on the claims involved; denies that any of said sum was so applied and used. In other respects, the affidavit in case 2539 follows that in case 2540.

The "payment" of the \$1836 has already been somewhat thoroughly discussed. There is equal application of these comments made upon the bills standing alone to the situation as we find it in the light of the defendant and appellant Pack's allegations with reference to this "contribution". Assuredly it cannot be said that even in the remotest way does Pack admit the receipt by him of \$1836 in money or its equivalent. His admissions with reference to the execution and existence of the I. O. U. exhibit a much greater willingness to communicate to the Court

in detail the facts surrounding this transaction, than affiant Lee, on behalf of the complainant, has at any point in his statements shown. To one closely reading for the first time the affidavits of the appellants, and with them the assertions of affiant Lee, there cannot but be borne home an impression, becoming with re-reading a conviction, that affiant Lee has something to conceal, that somewhere in the structure of his case there is weak timber of which the Chancellor must be kept in ignorance. Contrast is found in appellants' affidavits. Full disclosure is made, clumsily, perhaps, but none the less with a very apparent desire to place all the facts, both pro and contra within the Court's scrutiny.

AS TO THE BOND.

It may not be amiss to point out, further, that the appellee has mistaken our point in stressing the failure of the District Court to require a bond of the complainant as a condition to the issuance or maintenance in force of the injunction. We recognize that the requiring or dispensing with a bond is a matter within the discretion of the Chancellor, and that therefore it cannot be said, as the appellee would have us say, "that the Court below committed error in not requiring a bond" (Supplemental Brief, p. 3). What we did urge in our opening brief (pp. 94-100) and now repeat is that in a case of this kind, where the defendants' financial responsibility was unquestioned and that of the complainant was directly ques-

tioned, and where the injunction might irreparably injure the defendants, the fact that the Court did not see fit to require any security for the protection of the defendants is persuasive of its failure to apply or even consider the test of relative inconveniences. Even had the rights of the appellee been clearer and more certain of eventual success than in fact they were, on the record before the District Court, the case was one for a conditional order, granting an effectual remedy to all parties, yet affording some optional latitude of action to the appellants, such as an order which would

"stop the appellants by injunction unless they gave a bond, providing, on their failure to do so, the appellee gave a bond to indemnify them".

City of Grand Rapids v. Warren Bros. Co., 196 Fed. 892, 897 (C. C. A. 6th Circ.).

See, also:

Jackson Co. v. Gardiner etc. Co., 200 Fed. 113, 114, 118-9 (C. C. A., 1st Circ.);
Coca-Cola Co. v. Nashville Syrup Co., 200 id. 153, 156.

Moreover, this point was expressly drawn to the attention of the District Court. One of the grounds upon which were based the motions to dissolve the injunctions was "that the order (for the injunctions) does not provide for any security for defendants' costs and damages and it appears from the affidavits served herewith that complainant is financially irresponsible". (Tr., case 2539, p. 48.)

GENERAL CONSIDERATIONS.

To follow appellees' arguments, as well as they may be followed, down to the present point is to be again confronted with the realization that no effort whatever is being made by appellees to look upon the cases with the broad vision that equity, with its rules of the balance of convenience, and reluctant issuance of injunctions, demands of cases such as these. "Look to the facts", it is exclaimed. "Appellants admit all that we assert, and more." For the sake of argument, grant this, and still there remain unanswered such fundamental inquiries as these:

1. Were there not other methods of relief, as salutary as and less drastic than injunctive relief, open to appellees, and therefore more properly to be invoked than the restraint of equity?

2. Is not the public policy expressed in U. S. R. S. 2324 subverted by the establishment of a precedent that will permit an owner, who is delinquent as to and in the debt of a co-owner, to thwart the designedly summary and expeditious remedy of forfeiture?

An affirmative answer to either of these queries serves to undermine the foundation of the District Court's action.

Under the head of the first of these questions the application of the doctrine of *lis pendens* is prominent. If the forfeiture proceedings were fraudulent or instituted without right, would not a bill to cancel them or a bill to quiet title, with the accompanying notice *in rem* of the pendency of the action, serve appellees' end with even greater effect than injunc-

tion, and with equal safety? And this without subjecting appellants to the hardship that cannot but be presumed to, and in these present cases most certainly does, follow prohibitive measures? Is not the present procedure adopted by appellees a misconception of an effective remedy? Has not the mere lapse of ninety days from the time of service of the Notices of Forfeiture already worked the harm appellees fear so greatly, and completed the divestiture of their title? How can their prayer "that forfeiture be prevented" be granted?

Also under this same head there can be no escape from meeting and answering the question: If appellees actually have contributed their proportion due for assessment work, why have they not protected themselves behind the simple and satisfactory provisions of Section 14260 of the California Civil Code? Why have not appellees, under this provision, recorded the affidavits of payment provided for thereby? Either appellees have overlooked this remedy, to appellants' detriment, or they have not actually contributed moneys, or they recognized the fact that what they have paid is but a fraction of what they should have paid.

The impropriety of the injunctions on grounds of public policy seems entitled to the gravest consideration. The creation of an engraftment upon the body of the forfeiture statute, especially under such facts as those at bar, where it affirmatively appears by most persuasive inference that the delinquent co-owner is in fact a debtor of him who would "forfeit out" the

former, would make of a summary proceeding a creature of delay and technicality. Of still greater force does this argument become when it is noted that no protection is thereby denied the alleged delinquent; a bill to quiet title, to cancel the forfeiture, or to declare the co-owner, in whom forfeiture proceedings wrongfully undertaken have vested the legal title, a trustee thereof for the alleged delinquent, afford ample relief and safety.

AS TO CRITICISM OF APPELLANTS' PRACTICE.

Both the District Court and counsel for appellee have commented with rather unnecessary acerbity upon the appellants' action in appearing twice in Court and arguing first against the granting of the temporary injunction and later, upon affidavits, on a motion to dissolve the temporary injunction. Needless to say, this practice is a usual and proper one in the Federal Courts, allowed both by the rules and the authorities. A late instance may be cited.

Western Union etc. Co. v. Louisville & N. R. Co., 201 Fed. 946, 947, 951.

The reason for such practice is, of course, that the defendants may not be able, in fact, are more than likely to be unable, to appear armed with affidavits and make their best counter-showing on the return day of the order to show cause. Good sense justifies their having an opportunity to present their case in rebuttal on a date selected with some consideration

for their convenience. This being the case, it is somewhat difficult to understand the attitude of the District Court upon the second hearing, as shown by its opinion, which is not a part of the record but which is appended to the appellees' Supplemental Brief (p. 34):

"I think that every practitioner realizes that when the Court makes an order to show cause why certain relief should not be granted to the other party, on the return day of the order *he should show all the cause he may have.* That is the purpose of giving him that opportunity. *I certainly am not going to encourage a practice which will enable a party to show part of his cause on one day, and then on another day show another cause which he should have shown on the return day.* It has a tendency to trespass upon the patience and good nature of the Court, if I may be permitted to indulge in that expression, and *I do not believe it is the kind of practice that should be encouraged.* That is all I have to say about that, because I assume from the statement made as to the facts of the case, that counsel acted in good faith. He no doubt believed that his objections by way of demurrer, so to speak, to the complaint, were well taken. The Court disagreed with him. That was not unexpected. The Court has to disagree with somebody. And having been thus illy advised, if I may use that phrase, *having been content to meet the order to show cause with an issue of law only,* it seems to me they ought to take their medicine, and either appeal, or say that the determination of the only issue tendered was right." (Italics ours.)

It would almost seem from this language as though the District Court failed to give any weight at all to

the affidavits of the appellants which it insists ought to have been filed at the earlier hearing. The Court's discretion could not but be improvidently exercised at a time when it considered that the appellants had no right to be heard.

"But discretion (which must be legal discretion, not merely the individual view or will of the particular chancellor) does not extend to a refusal to apply well-settled principles of law to a conceded or indisputable state of facts. If this is not so, Congress did a vain thing in providing at all for appeals from preliminary injunctive decrees."

Winchester Repeating Arms Co. v. Olmsted,
203 Fed. 493, 494 (C. C. A., 7th Circ.).

Certainly the District Court overlooked the fact that

"A temporary injunction is at all times subject to motion to vacate or modify, notwithstanding that in granting it the Court may have chosen to discuss the merits of the case."

Westerly Waterworks v. Town of Westerly, 77 Fed. 783 (Syllabus).

And, further, has not the District Court placed upon the appellants a burden ordinarily placed only upon those guilty of bad faith or dilatory tactics? The dates available from the records are eloquent in this respect; they show anything but delay or sloth upon appellants' part. The bills were filed on November 24, 1914 (Tr., case 2539, pp. 33 and 36). Argument on return of the orders to show cause was had and the matters submitted on December 8, 1914 (Tr., case

2539, p. 38). The injunctions *pendente lite* were granted on December 11, 1914 (Tr., case 2539, p. 45). Notices of motions to dissolve the injunctions, together with affidavits, were received and filed on December 14, 1914 (Tr., case 2539, p. 48). The hearing of the motions was set by appellants for December 19, 1914 (Tr., case 2539, p. 47). They were actually heard and denied on December 21, 1914 (Tr., case 2539, pp. 84 and 85), because of continuance by the Court (Tr., case 2539, p. 81). Appeals were perfected on December 23, 1914 (Tr., case 2539, p. 88), and the appeals argued before the Appellate Court on February 3, 1915.

It is submitted that such dispatch is not customarily met with in the procedure of either the trial or the appellate courts. Can it be said that, even if appellants in the first instance committed an error of procedure, it was tainted with questionable motive? Should the clear vision of the Chancellor refuse scrutiny to the merits of injunction proceedings because of a trivial and harmless misstep in procedure?

OTHER OF APPELLEES' ARGUMENTS.

No other points made by appellee deserve more than this mention: They are either inapplicable or unsound. And as for the meager authorities cited, reference to them warrants their characterization as doubly inapplicable.

CONCLUSION.

Brevity protests against recapitulation in any detail.

Suffice it, therefore, that we point again, in effect, to the propositions of our first briefs:

1. Facts essential to injunction must each be verified, positive, certain, and sufficiently pleaded. The presentation of facts in the instant cases does not measure up to this standard. Therefore there has been reliance upon an erroneous hypothesis of pertinent fact, and consequent reversible error.

2. Even if the presentation of facts be taken as sufficient—and the sufficiency of each essential fact is necessary to constitute the sufficiency of the whole—its effect is overcome by the positive denials found in appellants' affidavits. A fact essential denied, the equity supporting the injunction falls, and with it the reason for the injunction. Dissolution should follow. Denial of dissolution under such circumstances is improvident exercise of discretion; therefore, reversible error.

3. Certain settled rules have been established to guide the Chancellor in the issuance of injunctions. Among these rules primarily is that requiring the statement of facts within the equity jurisdiction. Further among these rules is that of the balance of convenience, that requiring use of all remedies as effective as the injunctive remedy before it may be sought, and that requiring consideration of dictates of public policy. Disregard of any of these rules constitutes an improvident exercise of discretion; therefore, reversible error.

It is respectfully submitted that, in the light of these propositions, the District Court has committed pre-

judicial error warranting reversal of the respective orders granting the injunctions, and the respective orders denying dissolution, together with appellants' costs on these appeals incurred.

Dated, San Francisco, California, March 13th, 1915.

Respectfully submitted,

...Charles W. Slack....

...Joseph K. Nutt.....

Solicitors for Defendants and Appellants.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,
Appellants,
vs.
E. THOMPSON,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

Filed

JAN 23 1915

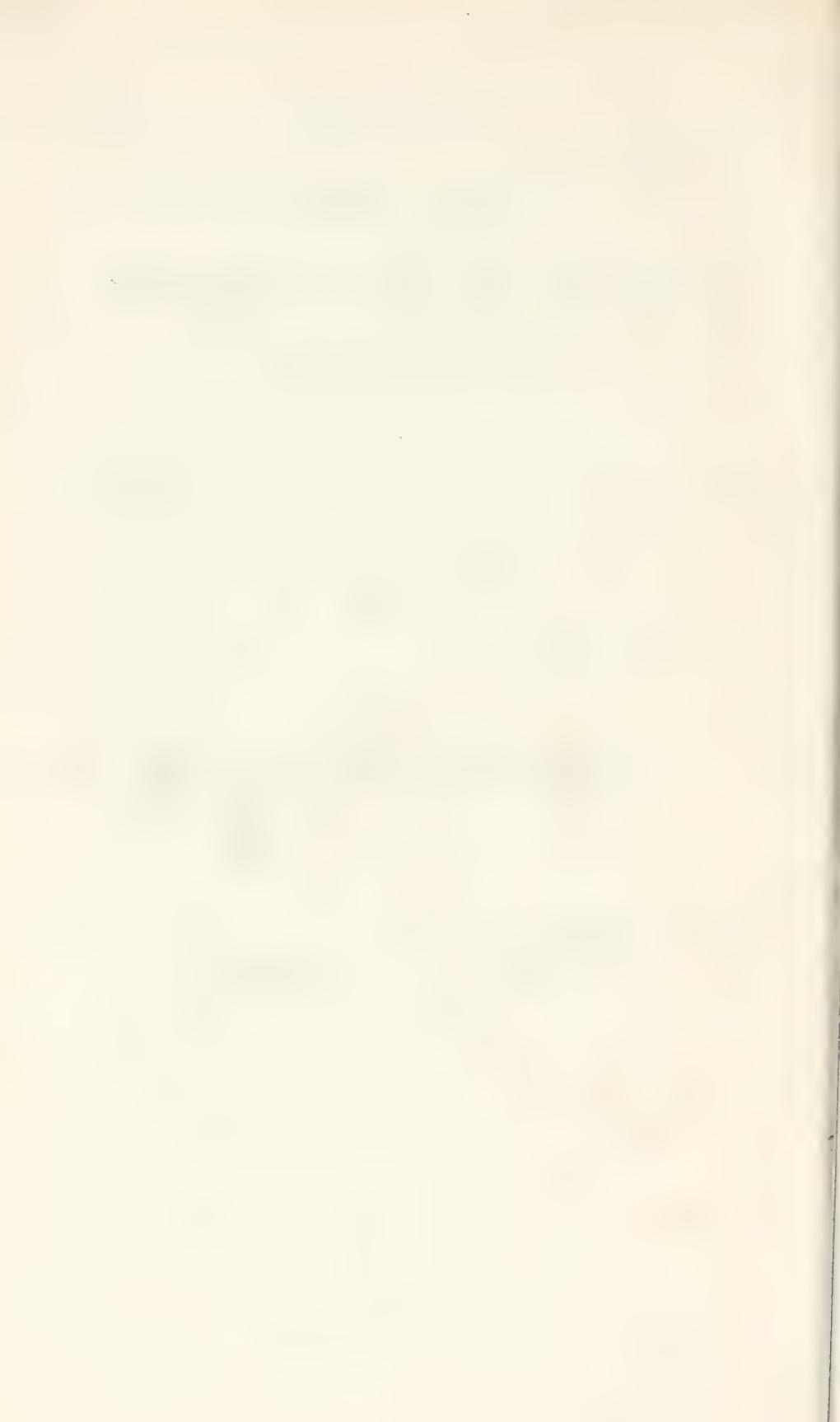
F. D. Monckton,
Clerk.

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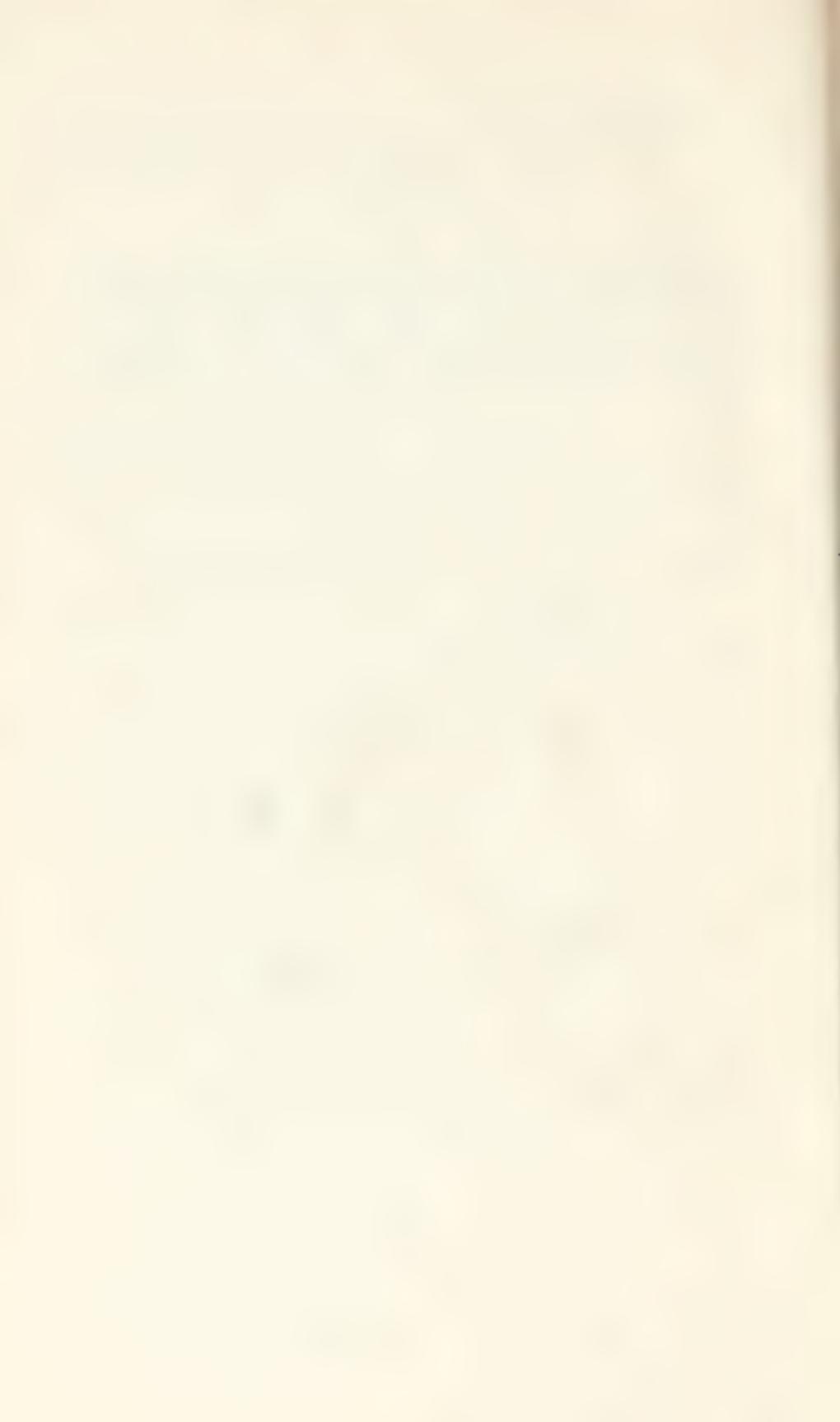
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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R. P. HENSHALL, Esq., Los Angeles, California. [3*]

[Citation on Appeal (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to E. Thompson,
Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern District of California, Southern Division, wherein Thomas W. Pack, Stella Schuler and Joseph K.

*Page-number appearing at foot of page of original certified Record.

Hutchinson are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable BENJAMIN F. BLEDSOE, United States District Judge for the Southern District of California, this 25th day of December, A. D. 1914.

BENJAMIN F. BLEDSOE,
United States District Judge. [4]

Due service of within Citation on Appeal, and receipt of copy thereof, is hereby admitted this 26th day of December, 1914.

H. L. CLAYBURG,
CLAYBURG & WHITMORE,

Solicitors for Complainant and Appellee, E. Thompson.

[Endorsed]: No. B. 50-Eq. United States District Court for the Southern District of California. Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, Appellants, vs. E. Thompson, Appellee. Citation on Appeal. Filed Dec. 28, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk.

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants. [5]

*In the District Court of the United States, Southern
District of California, Southern Division.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Bill in Equity.

Now comes the above-named complainant and for cause of action against defendants above named complains and alleges:

That complainant is now, and at all times herein-after stated, was a citizen of the United States and of the State of New Jersey, and a resident of the State of New Jersey; that the defendants, Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, and each of them, now are, and at all times hereinafter

mentioned were citizens of the United States and of the State of California, and residents of the State of California; that the amount in controversy between the plaintiff and defendants herein in this action exceeds, exclusive of costs and interest, the sum of Three Thousand Dollars (\$3,000.00); that the real estate and placer mining claims affected by this suit are situate in San Bernardino County, State of California, that neither the said complainant nor the said defendants, or either of them, are now, nor for a long time prior to the commencement of this suit, have they or either of them been in the actual possession of the said placer mining claims, hereinafter particularly described.

I.

That during the year 1910, plaintiff jointly with one, H. C. Fursman, W. Huff, H. A. Baker, R. Waymire, P. Perkins, D. Smith and defendant, Thos. W. Pack, duly located and recorded twelve certain [6] placer mining claims, hereinafter more particularly described, situate in and upon Searles Borax Lake, County of San Bernardino, State of California; that plaintiff is now, and ever since the date of said locations, has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims and each of them; that the said twelve placer mining claims above referred to are more particularly described, named and numbered as follows, and are more fully described in said notices of locations, copies whereof are recorded in the office of the County Recorder of San Bernardino County, State of California, in Volume 82 of Mining Records, at

the pages of said volume hereinafter designated following the respective names of said placer mining claims, to wit:

"The Soda No. 68 Placer Mining Claim," at page 164 thereof;
"The Soda No. 69 Placer Mining Claim," at page 165 thereof;
"The Soda No. 70 Placer Mining Claim," at page 165 thereof;
"The Soda No. 71 Placer Mining Claim," at page 166 thereof;
"The Soda No. 72 Placer Mining Claim," at page 166 thereof;
"The Soda No. 87 Placer Mining Claim," at page 174 thereof;
"The Soda No. 88 Placer Mining Claim," at page 174 thereof;
"The Soda No. 89 Placer Mining Claim," at page 175 thereof;
"The Soda No. 90 Placer Mining Claim," at page 175 thereof;
"The Soda No. 91 Placer Mining Claim," at page 176 thereof;
"The Soda No. 111 Placer Mining Claim," at page 186 thereof;
"The Soda No. 112 Placer Mining Claim," at page 186 thereof.

II.

That during the month of September, 1914, the above-named defendants caused to be served upon plaintiff, a paper which purports to be a notice of forfeiture, a copy of which said so-called "Notice of Forfeiture" is hereto attached, marked Exhibit "A" and made a part hereof. That in and by said pretended Notice of Forfeiture it appears that all of plaintiff's right, claim, title [7] and interest in and to the said twelve above-described placer mining claims, and each thereof, will be forfeited and a cloud cast upon plaintiff's title thereto within ninety days from the date of service of said so-called Notice of Forfeiture upon this plaintiff, unless plaintiff, within said ninety days, pays to defendants or to defendant, Joseph K. Hutchinson, for said defendants, the sum of \$150.00, claimed to be one-eighth of the total amount of money claimed to have been ex-

pended by said defendant Pack upon said claims in the year 1911 as recited in said pretended Notice of Forfeiture. (Exhibit "A.")

III.

Plaintiff alleges that the said defendant, Thos. W. Pack, did not expend, or cause to be expended, during the year 1911, or during any other year, or at any other time, or at all, the sum of \$1,200.00, or any part or portion thereof, or any other sum or sums or any sum at all of his own money or funds upon said twelve above described placer mining claims, or upon any of them, or upon any placer mining claim or claims located and recorded by this plaintiff, or by this plaintiff and others, or in which this plaintiff had or has any interest, in the County of San Bernardino, State of California, or elsewhere, for labor and improvements, or for labor or improvements thereupon, or upon any of them, or for any purpose whatsoever, or at all. Plaintiff further alleges that the said Thos. W. Pack did not expend or cause to be expended, during the year 1911, or during any other year, or at any other time, or at all, the sum of \$100.00 or any part or portion thereof, of his own money or funds, or any other sum or sums, or any sum at all, upon each, or upon any or all of said above described twelve placer mining claims, or upon any placer mining claim or claims, located and recorded by this plaintiff, or by this plaintiff and others, or in which this plaintiff had or has any interest in the County of San Bernardino, State of [8] California, or elsewhere, for labor and improvements, or for labor or improvements thereupon, or

upon any of them, or for any purpose whatsoever, or at all.

IV.

That said pretended Notice of Forfeiture does not, in any way, describe the kind, character or nature of the pretended labor and improvements, or labor or improvements, claimed to have been done and performed upon said claims, or any of them, during the year 1911, by the said Thos. W. Pack.

That plaintiff is unable to ascertain from said pretended Notice of Forfeiture whether the said defendant Pack claims to have actually expended, of his own money or funds, in labor and improvements, or in labor or improvements, upon each of said placer mining claims, the said sum of \$100.00, or the sum of \$1,200.00 upon all of them, or any other sum or amount, or whether the said defendant Pack claims to have expended such money in the transportation of men and supplies to Searles Borax Lake for the purpose of having done upon each and all of said placer mining claims the annual representation work for the year 1911; that plaintiff cannot ascertain from the said pretended Notice of Forfeiture whether the amounts claimed to have been expended by said defendant Pack of his own money or funds upon said placer mining claims, or upon any of them, if he ever expended any money at all thereon, was the value of \$100.00 for each claim, or of the value of \$1,200.00 for all, or whether such labor and improvements, or labor or improvements increased the value of each of said claims in the sum of \$100.00, or the value of them all in the sum of \$1,200.00, or whether said pre-

tended labor and improvements, or labor or improvements, tended in any way to develop any or all of said placer mining claims, or increased or aided in availability for taking ores or minerals from said claims, or from any of them; that this plaintiff further alleges upon [9] information and belief that the said defendant Pack, if he expended any of his own money or funds pretending to be for or in the representation of said placer mining claims, or any of them, for the year 1911, expended a greater part or portion, or all of such money, in the transportation of men and supplies to Searles Borax Lake, San Bernardino County, California, where said placer mining claims are located, as aforesaid, and in furnishing and supplying food, wearing apparel, delicacies and luxuries to the men so transported to said Searles Borax Lake for the purpose of performing said representation work during said year upon said claims.

That said pretended Notice is executed, made and signed by defendants Thos. W. Pack, S. Schuler and Joseph K. Hutchinson; that the same discloses upon its face that neither the said Schuler or the said Hutchinson, or either, or both of them, had any interest or ownership in or to the said placer mining claims mentioned therein, or in or to any part or portion of them, during the year 1911, or during the time it is claimed Thos. W. Pack expended money for labor and improvements thereon, and that neither the said S. Schuler, or the said Joseph K. Hutchinson ever expended, or caused to be expended the money

named in said pretended Notice of Forfeiture, or any money thereon.

V.

That on or about the 25th day of December, 1913, defendant S. Schuler made, executed, acknowledged and delivered her deed and conveyance to one J. A. Shellito, whereby she transferred and conveyed to said J. A. Shellito all of her right, title and interest in and to said above-described placer mining claims, together with her right, title and interest in and to certain other placer mining claims therein described; that thereafter and on or about the 14th day of January, 1914, the said defendant Schuler assumed to convey to defendant Hutchinson the same interest and property [10] that she, the said defendant Schuler, had theretofore conveyed to the said J. A. Shellito, as hereinabove alleged; that the said defendant Hutchinson, at the time of receiving said conveyance was fully informed and had full knowledge that the said defendant Schuler had conveyed all the rights, interest, claims and property therein described to the said J. A. Shellito, a long time prior to the execution of said conveyance by said Schuler to said Hutchinson; that plaintiff further alleges that the said Hutchinson took said conveyance from the said defendant Schuler for the sole and only use and benefit of the Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or for all or a part of them, and not for his own use and benefit, and in pursuance of a combination and conspiracy by and between these defendants in this suit and the said Foreign

Mines and Development Company, the American Trona Company and the California Trona Company, wherein and whereby the said defendants, and the said above-named corporations confederated and combined together to injure plaintiff and to deprive and defraud him of all his right, title and interest in and to said above described placer mining claims.

VI.

Plaintiff further alleges upon his information and belief that the pretended transfer of the said one-eighth interest of the said Thos. V. Pack in and to these said above-described claims by the said S. Schuler to the said Joseph K. Hutchinson, if such transfer was made at all, as set forth in said pretended Notice of Forfeiture, was made and done pursuant to and in order to carry out a combination and conspiracy to injure plaintiff and to deprive and defraud him of all his right, title and interest in and to said placer mining claims and each and all of them; that the said pretended transfer to the said Joseph K. Hutchinson by the said S. Schuler was made and done, if made and done at all, wholly and totally without a valuable or other consideration; [11] that if any consideration at all was paid by the said Joseph K. Hutchinson to the said S. Schuler for the said transfer, the same was advanced and paid by the Foreign Mines and Development Company, a corporation, or by the American Trona Company, a corporation, or by the California Trona Company, a corporation, or by part or all of them, or by some person or persons authorized by them, or part or all of them, or acting for them, or for part or all of them,

and on their behalf, or on the behalf, of part or all of them; that the said Joseph K. Hutchinson took the title to the said one-eighth interest in and to these said above-described claims, if he took the title at all, for the sole benefit and use of the said Foreign Mines and Development Company, or the American Trona Company, or the California Trona Company, or for part or all of them, and not for his own use and benefit; that the said Joseph K. Hutchinson now claims to hold the said title to the said one-eighth interest in and to the said above-described claims, if such title ever passed to him, for the sole and only use and benefit of the said Foreign Mines and Development Company, the said American Trona Company, the said California Trona Company, or for the sole use and benefit of part or all of them, and not for his own use and benefit.

Plaintiff further alleges that the Foreign Mines and Development Company, the American Trona Company and the California Trona Company claim rights and interest in and to the mineral lands covered by said placer locations so made and recorded by plaintiff and others, as hereinabove alleged, and that said Foreign Mines and Development Company, the American Trona Company and the California Trona Company have for some years last past been endeavoring to defeat the locations so made by plaintiff and others, as hereinabove alleged, and that the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company have, and each and every of [12] them has, as plaintiff is informed and believes, fraudu-

lently attempted to procure the right, title and interest of defendant, Pack, in and to said locations so made by plaintiff and others as hereinabove alleged, for the express purpose, and none other, of using the said interest of the said Pack in and to said locations, in such a way and manner as to destroy all of plaintiff's rights and interest therein, and to defraud this plaintiff out of all interest in and to said claims, and each of them; this plaintiff further alleges on like information and belief that the defendant, Joseph K. Hutchinson, has been acting as the agent, representative and attorney of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, in endeavoring to deprive and defraud plaintiff of his rights and title in and to said placer mining locations, as above alleged; that the said defendant, Joseph K. Hutchinson, under the direction and orders of the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, fraudulently obtained said transfer of the said one-eighth interest in and to said placer mining claims, if he obtained said transfer at all, from defendant Schuler, in pursuance to the combination and conspiracy entered into and carried on by and between said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, and each of them, and the said defendants herein, and each of them, to injure plaintiff and defraud and deprive him of all of his right, title and interest in and to said claims, and each of them; that

in further pursuance of said combination and conspiracy, and under the orders and direction of the said Foreign Mines and Development [13] Company, the American Trona Company and the California Trona Company, or all or part of them, said defendant Joseph K. Hutchinson, and the said defendants Schuler and Pack, caused to be served upon plaintiff the pretended Notice of Forfeiture above described (Exhibit "A"); that the fraudulent transfer of the said one-eighth interest in and to said claims by the said defendant Schuler to the said defendant Hutchinson, if any transfer was made at all, and the serving of the said pretended Notice of Forfeiture upon the said plaintiff as aforesaid, was all done in pursuance to and in the carrying out of a combination and conspiracy entered into by and between the said Foreign Mines and Development Company, the American Trona Company and the California Trona Company, or all or part of them, and the said defendants, and each of them, confederated together for the purpose of injuring plaintiff and depriving and defrauding him of all his right, title and interest in and to said placer mining claims above described.

VII.

Plaintiff further alleges upon his information and belief that the said pretended Notice of Forfeiture was prepared and served upon him pursuant to and in the furtherance of such combination and conspiracy between the defendants herein and the said Foreign Mines and Development Company, the American Trona Company and the California Trona Com-

pany, and that the said Thos. W. Pack never, during the year 1911, or at any other time, expended or caused to be expended, the sum of \$1,200.00 of his own funds or money, or any other sum or amount in and upon said claims, or upon one, or any of them, for any purpose whatsoever, and that neither he nor any of the defendants herein, or their co-conspirators are entitled to any contribution from plaintiff in any sum or amount whatsoever.

VIII.

That Plaintiff is informed and believes that none of the money [14] defendant Pack claims to have expended as and for representation work, or for labor and improvements, or labor or improvements, on the above-described claims, or any thereof, if expended by the said Pack at all, was expended by him for the actual representation and assessment work upon the said claims, or any of them, as required by law; but plaintiff alleges that defendant Pack paid the moneys set forth in the said pretended Forfeiture Notice, if he paid any money at all, for certain goods, wares and merchandise, furnished to certain laborers, employed by plaintiff and his colocators doing assessment work on said claims in the years 1911 and 1912, and for automobile hire in transporting said laborers and supplies to and from said placer mining claims.

IX.

That on the 14th day of January, 1913, one W. W. Colquhoun, through his attorney, Joseph K. Hutchinson, one of the defendants herein, filed a suit against defendant Pack, one Henry E. Lee and one

T. O. Toland, in the Superior Court of the State of California, in and for the City and County of San Francisco, which said suit is entitled "W. W. Colquhoun, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, a copartnership, and Thos. W. Pack, Henry E. Lee and T. O. Toland, as Individuals, Defendants, and numbered 46,604 in the record of the Superior Court of the City and County of San Francisco, State of California; that in the verified complaint in said suit plaintiff, W. W. Colquhoun, alleges that he is the assignor of C. J. and E. E. Teagle, and that the sum of \$750.00 is due him for certain goods, wares and merchandise sold and delivered to the said Pack and the other two defendants named in said suit, during the years 1911 and 1912, and that the same had never been paid. This plaintiff alleges upon information and belief that the said goods sued for in said action were purchased by said Pack from C. J. and E. E. Teagle in the town of Johannesburg, Kern County, California; that the whole amount of [15] said goods, wares and merchandise so purchased by the said Pack from the said Teagles was the sum of \$969.00 and that the said Teagles admit that the sum of \$219.00 has been paid upon said account; that this plaintiff further alleges upon his information and belief that the said sum of \$750.00, sued for in said action, constitutes part of the amount which the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above-described placer mining claims,

and for the pretended payment of which the said defendants are now seeking contribution from this plaintiff and threatening a forfeiture of his rights and interests in and to said above described placer mining claims; upon his failure so to contribute, as recited in their said pretended Notice of Forfeiture; that on the 4th day of February, 1914, a judgment was rendered in said suit against the said Pack, in favor of plaintiff, in the whole amount sued for, which said judgment is now standing of record and docketed in Volume No. 29 of Judgments at page 484 of the records of the County Clerk of the City and County of San Francisco, State of California, and has never been satisfied or discharged, either in whole or in part, or set aside, vacated or modified.

X.

That on the 20th day of January, 1913, one M. A. Varney, by his attorney, Joseph K. Hutchinson, one of the defendants herein, filed a suit in the Superior Court of the City and County of San Francisco, State of California, against defendant Thos. W. Pack, one Henry E. Lee and one T. O. Toland, which said suit was entitled in said Superior Court, "M. A. Varney, Plaintiff, vs. Thos. W. Pack, Henry E. Lee and T. O. Toland, as individuals, and Thos. W. Pack, Henry E. Lee and T. O. Toland, a Copartnership, Defendants," and numbered 46,692 in the records of the said Superior Court; that in the verified complaint in said suit the plaintiff [16] therein, the said M. A. Varney, alleged that during the years 1911 and 1912 he furnished supplies and rendered services to defendant Thos. W. Pack and the other defendants

therein, in the sum of \$4,180.00, of which said sum only \$535.00 had been paid; that thereafter and on or about the 4th day of February, 1913, a judgment was entered in said action against the said Thos. W. Pack, in favor of plaintiff, in the whole amount sued for. That plaintiff is informed and believes and therefore alleges the fact to be that said judgment in said suit is still standing of record and has never been satisfied, set aside, vacated or modified. That plaintiff is informed and believes and therefore alleges the fact to be that the last above-named action was brought by the said M. A. Varney to recover the sum of \$4,180.00 from the said Thos. W. Pack, Henry E. Lee and T. O. Toland, for the use of two certain automobiles and certain supplies furnished by the said M. A. Varney to the said Thos. W. Pack, at his special instance and request, in the years 1911 and 1912, and used by the said Thos. W. Pack to transport men hired by plaintiff and his colocators to do the annual assessment work on said above-described placer claims for said years, and supplies for said men, from the City of Los Angeles and elsewhere to the above-described placer claims on Searles Borax Lake, San Bernardino County, California; that plaintiff alleges upon his information and belief that the said sum of \$4,180.00 sued for in said action, constitutes part of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above-described placer mining claims, and for the pretended payment of which the

said defendants are now seeking contribution from this plaintiff, and threatening a forfeiture of his rights and interests to and to said above-described placer claims upon his failure so to contribute, as recited in their said pretended [17] Notice of Forfeiture (Exhibit "A").

XI.

That on the 2d day of September, 1913, one W. W. Colquhoun, by his attorneys, Joseph K. Hutchinson, one of the defendants herein, and Walter Slack, filed a suit in the Superior Court of the State of California, in and for the City and County of San Francisco, against this plaintiff and H. C. Fursman, W. Huff, P. Perkins, H. A. Baker, R. Waymire, D. Smith and S. Schuler, to recover the sum of \$750.00 alleged to be due said plaintiff for the value of certain goods, wares and merchandise, which said suit is entitled in said Superior Court, "W. W. Colquhoun, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a Copartnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as Individuals, Defendants," and numbered 50,723 in the files and records of the said Superior Court; that in his verified complaint in said suit the said W. W. Colquhoun alleges that C. J. and E. E. Teagle assigned to him the said claims sued upon in said action; he further alleges that during the years 1911 and 1912 the said C. J. and E. E. Teagle furnished certain goods, wares and merchandise of the value of \$750.00 to defendants therein, including this plaintiff,

and that no part of said sum had been paid; that plaintiff herein alleges the fact to be that said suit was brought by plaintiff for the value of the said goods, wares and merchandise claimed to have been sold and delivered by plaintiff's assignors to Thos. W. Pack in the years 1911 and 1912, and it is claimed that the same were used by a camp of men doing assessment work upon the claims hereinabove described, together with other placer mining claims, during the years 1911 and 1912; that the whole amount of the value of said goods, so alleged to have been sold was \$969.00, but that the said plaintiff in said suit admitted the payment of the sum of \$219.00 on account. That thereafter and on or about the 27th day of October, 1913, R. [18] Waymire filed his verified answer to the complaint in said action; that thereafter a trial was had of the issues therein, and after judgment had been entered against R. Waymire, the said Court on the 11th day of August, 1914, granted the motion of R. Waymire for a new trial thereof; that plaintiff in said suit, as this plaintiff is informed and believes, is now prosecuting an appeal from the order of said Court granting the said motion for a new trial. That plaintiff alleges upon his information and belief that the said sum of \$750.00 sued for in said action, and the sum of \$219.00 admitted to have been paid on account therein, constitute part of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above described

placer mining claims, and for the pretended payment of which by the said Pack, the said defendants are now seeking contribution from this plaintiff, and threatening a forfeiture of his rights and interests in and to said above-described claims upon his failure to so contribute, as recited in their said pretended Notice of Forfeiture.

XII.

That on the 30th day of August, 1913, one M. A. Varney, by his attorneys, Joseph K. Hutchinson, one of the defendants herein, and Walter Slack filed a suit in the Superior Court of the City and County of San Francisco, State of California, against H. C. Fursman, W. Huff, P. Perkins, H. A. Baker, R. Waymire, D. Smith, S. Schuler and this plaintiff, which said suit is entitled in said Superior Court, "M. A. Varney, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, a Copartnership, and H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith and S. Schuler, as Individuals, Defendants," and numbered 50,724 in the files and records of the said Superior Court; that in the verified complaint in said suit the plaintiff therein, the said M. A. Varney, alleged that during the years 1911 and 1912 he furnished supplies and [19] rendered services to the defendants therein in the sum of \$4,170.00, of which said sum only \$500.00 has been paid; that plaintiff alleges the fact to be that the said action was brought by the said M. A. Varney to recover the sum of \$3,670.00 from the said defendants for the use of two

certain automobiles and certain supplies furnished by the said M. A. Varney to the said Pack at his special instance and request, in the years 1911 and 1912 and used by the said Pack to transport men and supplies from the City of Los Angeles and elsewhere to the above-described claims on Searles Borax Lake, San Bernardino County, California.

That thereafter and on or about the 20th day of October, 1913, R. Waymire filed his verified answer to the Complaint in said action; that thereafter various proceedings were had therein and a trial thereof was had before the Court, and that on or about the 16th day of July, 1914, R. Waymire moved the Court for a nonsuit in said action, which motion for nonsuit was by the Court granted; that on or about the 7th day of October, 1914, judgment was entered in favor of R. Waymire, which said judgment is now of record in the office of the Clerk of said Superior Court in Volume 77 of Judgments at page 93 thereof. That this plaintiff alleges upon his information and belief that the said sum of \$3,670.00, sued for in said action, and the sum of \$500.00 alleged to have been paid on account therein, constitute part of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above-described placer mining claims, and for the pretended payment of which, by the said Pack, the said defendants are now seeking contribution from this plaintiff and threatening to forfeit all of plaintiff's rights, title and interest in and to said placer mining claims, if

he does not so contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A"). [20]

XIII.

That on or about the 26th day of February, 1914, one Raphael Mojica filed an action in the Superior Court in the City and County of San Francisco, State of California, against this plaintiff, his co-locators and defendant S. Schuler, as assignee of the defendant Pack, one Henry E. Lee and various other parties to recover the sum of \$1,443.50, which said action is entitled "Raphael Mojica, Plaintiff, vs. H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, a copartnership, H. C. Fursman, W. Huff, R. Waymire, P. Perkins, H. A. Baker, E. Thompson, D. Smith, T. W. Pack, an association, and Henry E. Lee, Thomas O. Toland, H. C. Fursman, W. Huff, Rudolph Waymire, P. Perkins, H. A. Baker, E. Thompson, Dudley Smith, Stella Schuler, John Doe, Jane Roe, Richard Roe and Mary Roe, Defendants," and is numbered 54,989 in the files and records of said Superior Court; that in his verified complaint in said action the said plaintiff pretends to be the assignee of thirty certain Mexican laborers, and pretends therein that each of these said Mexican laborers named therein had assigned to him their claims against the defendants therein for doing certain labor and work, in and upon the above-described placer claims by way of assessment work thereon, during the year 1912; that said action is now at issue in said Superior Court; that plaintiff is informed and believes and therefore alleges the fact to be that the

said sum of \$1,443.50 sued for in said action constitutes a portion of the amount the said defendants in this suit claim in their said pretended Notice of Forfeiture (Exhibit "A") to have been paid by the said Thos. W. Pack in the year 1911 for doing the assessment work on the above described placer mining claims and for the pretended payment of which the said defendants are now seeking contribution from this plaintiff, and threatening to forfeit all of plaintiff's right, title and interest in and to said placer mining claims if he does not so contribute, as recited in their said pretended Notice of Forfeiture (Exhibit "A"); that plaintiff is informed and believes that no part of said sum of \$1,443.50 sued for in said action has been paid by the said Thos. [21] W. Pack, or by anyone whomsoever for him.

XIV.

That a short time prior to the dates when the said defendant Thos. W. Pack claims to have expended money for the purpose of doing assessment work on the above described placer mining claims, as claimed in defendants' pretended Notice of Forfeiture (Exhibit "A"), one Henry E. Lee, as duly authorized agent and representative of this plaintiff, and of his colocators, paid to the said defendant, Thos. W. Pack, for this plaintiff, and for his said colocators in their respective proportionate shares, the sum of \$1,000.00, as a portion of their *pro rata* contribution for the doing of said actual assessment work for the years 1911 and 1912 upon said claims, and for the purpose of being applied toward and used in said actual assessment work thereon; that as plaintiff is

informed and believes the said Thos. W. Pack, did so use the said sum of \$1,000.00 for said purpose in said year and that the said amount should be credited to this plaintiff and his colocators in proportion to their respective interests in the said placer mining claims.

XV.

That plaintiff further alleges that during the year 1911, and prior to the time any money is claimed to have been expended by the said defendant Pack in his said pretended Notice of Forfeiture (Exhibit "A"), the said defendant Pack duly acknowledged in writing that he was indebted to one Henry E. Lee, the duly authorized agent of plaintiff, and his colocators, in the sum of \$1,836.00, and that the said Henry E. Lee, acting as such agent for plaintiff and his colocators, directed the said defendant Pack to use and utilize all of said money, or so much thereof as might be necessary, in the annual representation of the placer mining claims hereinabove described in said pretended Notice of Forfeiture (Exhibit "A") for the years 1911 and 1912, and that the said defendant Pack agreed with the said Henry E. Lee that he would so utilize and use said money; that plaintiff claims [22] that said sum of \$1,836.00 is and should be a portion of the money expended by the said defendant Pack, as described in the said pretended Notice of Forfeiture (Exhibit "A"); that the said money and indebtedness was money due and owing to this plaintiff and his colocators from the said defendant Pack, duly evidenced by his written acknowledgment of such indebtedness to the said Henry E. Lee, the duly authorized agent of this plain-

tiff and his colocators, and that said amount should be credited to this plaintiff and his colocators in proportion to their respective interests in their said placer mining claims.

XVI.

Plaintiff further alleges that simultaneously with the service of said pretended Notice of Forfeiture (Exhibit "A") upon plaintiff, the said defendants served upon plaintiff another pretended Notice of Forfeiture, by the terms of which the said defendants claim that the defendant Pack expended during the years 1911 and 1912, the sum of \$5,600.00 for labor and improvements upon one hundred and seventy-five placer claims, among which are included the placer claims in said Exhibit "A," and hereinbefore in this complaint described; that by the terms of said pretended Notice of Forfeiture, so served upon plaintiff simultaneously with the service of said Exhibit "A," as aforesaid, the said defendants claim contribution from this plaintiff twice for the same money and twice for the representation of the placer claims in this complaint specifically described.

XVII.

Plaintiff has no means of knowing or of ascertaining what, if any, amount of his own money or funds said defendant has expended on said placer mining claims, or upon any of them, for annual representation work for the year 1911, and that the only method whereby plaintiff can procure said information is through this Court and by its order compelling the defendant, Thos. W. Pack, [23] to

account for and disclose any and all moneys expended or spent by him upon said placer mining claims, above described, or upon any of them, during the year 1911, for the purpose of representing same, and each and all thereof, for said year, if any money at all was so expended by the said Thos. W. Pack for such purpose, and whose money, if any, was expended by him, how expended, and what amount of the same, if any, was so expended and spent for labor and improvements, or labor or improvements upon the above-described claims, or upon any of them, which could lawfully be counted, considered or applied as such representation work, and for the expenditure of which he would be entitled to *pro rata* contribution from this plaintiff.

XVIII.

Plaintiff hereby and herewith offers and stands ready to pay to the said Thos W. Pack, or these defendants, or either of them, his proportionate share of any moneys belonging to the said defendant Thos. W. Pack which this Court finds were expended by the said Thos. W. Pack on the above-described claims, or any of them, as actual representation work thereon for the year 1911, if the Court finds he so expended any money at all for such purpose.

XIX.

That plaintiff further alleges that if the said defendants are allowed to proceed under said pretended Notice of Forfeiture (Exhibit "A") they will, at the expiration of ninety days from and after the date of the service of the said pretended Notice of Forfeiture, file and record a copy of said Notice

of Forfeiture (Exhibit "A") and an affidavit of service, with the County Recorder of San Bernardino County, California, and claim and assert that all the right, title and interest of this plaintiff in and to said placer claims, and each and all thereof, has been duly and legally forfeited and extinguished and thereby and by means thereof a cloud will be cast upon the title and interest of this [24] plaintiff in and to said placer mining claims, and each of them, and plaintiff be compelled to institute and prosecute a great number of suits to remove said cloud, at a great and exorbitant expense; that unless defendants are enjoined and restrained from proceeding to declare the forfeiture of plaintiff's rights in and to said placer claims and each of them as claimed in their said Notice of Forfeiture (Exhibit "A") this plaintiff will be compelled to institute, prosecute and maintain a multiplicity of suits in order to remove the clouds cast upon his said title and interest in and to each of said placer mining claims.

XX.

That plaintiff has no plain, speedy or adequate remedy at law in the premises, and unless defendants, and each of them, are restrained and enjoined from declaring a forfeiture of all of plaintiff's right, title and interest in and to said claims, and each thereof, pursuant to and in accordance with the pretended Notice of Forfeiture (Exhibit "A"), plaintiff will be irrevocably and irreparably damaged and injured, and be defrauded or deprived of all of his right, title and interest in and to said

placer mining claims, and each of them.

WHEREFORE plaintiff prays:

1. For a decree of this Court preventing any forfeiture of any right, title, interest or claim of this plaintiff in and to said placer mining claims above described, and in and to each and all of them.

2. For a decree of this Court directing said defendants, and each of them, to account and disclose to this plaintiff, and to this Court, for all moneys if any, belonging to the said Pack and constituting his own personal funds, and used and expended by him in procuring labor or improvements, or labor and improvements, which could be legally counted, considered or claimed as a representation or annual assessment work for the year 1911, on the above-described [25] placer mining claims, and on each of them, and that this Court ascertain and determine the amount, if any, thereof, and the proportion, if any, which this plaintiff should pay.

3. That these defendants, and each of them, their agents, attorneys, servants and employees be permanently restrained and enjoined from taking any steps to perfect or establish any forfeiture of plaintiff's rights, titles and interests in or to said placer mining claims, hereinabove described, or in or to any part or portion thereof, or any of them, and that in the meantime during the pendency of this suit, and until the final determination thereof on the merits, said defendants, and each of them, their attorneys, agents, servants, representatives or employees, and each and all of them, be restrained and enjoined from taking any steps to cast a cloud upon the title,

or to forfeit or to perfect or establish any forfeiture of plaintiff's rights, titles or interests in or to said placer mining claims hereinabove described, or any part or portion thereof, or any of them.

4. For plaintiff's costs of suit.

5. For such other and further relief as this Honorable Court may deem just and equitable in the premises.

H. L. CLAYBERG,
CLAYBERG & WHITMORE,
Attorneys for Plaintiff. [26]

*In the District Court of the United States, Southern
District of California.*

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants,

State of California,

City and County of San Francisco,—ss.

Henry E. Lee, being first duly sworn, upon his oath says:

That he has read the complaint in the above-entitled action, to which this affidavit is attached, and knows the contents thereof; that he has personal knowledge of all the facts and matters therein alleged, and knows them to be true, except as to those matters therein alleged upon information and belief, and as to them, he believes them to be true.

That he makes this affidavit for the plaintiff and

on his behalf, for the reason that the said plaintiff is now a resident of the City and County of San Francisco, State of California, and is not at the date of the making of this affidavit within said State of California, or within the City and County of San Francisco wherein this affiant resides and has his office and place of business.

HENRY E. LEE,

Subscribed and sworn to before me this 21st day of November, 1914.

[Seal] H. B. DENSON,

Notary Public in and for the City and County of San Francisco, State of California. [27]

Exhibit "A" [to Bill in Equity].

NOTICE OF FORFEITURE.

710 Claus Spreckles Building,
San Francisco, California, September 14th, 1914.
E. Thompson:

You are hereby notified that I, the undersigned, T. W. Pack, expended during the year 1911 the sum of Twelve Hundred Dollars (\$1200), in amounts of One Hundred Dollars (\$100), for labor and improvements, upon each of the twelve (12) following described placer mining claims:

Those certain placer mining claims situate in and upon Searles Borax Lake, County of San Bernardino, State of California, more particularly named and numbered as follows:

"The Soda No. 68 Placer Mining Claim," the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San

Bernardino, State of California, at page number 164 of said volume;

“The Soda No. 69 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 156 of said volume;

“The Soda No. 70 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 165 of said volume.

“The Soda No. 71 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 166 of said volume;

“The Soda No. 72 Placer Mining Claim,” the location Notice [28] of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 166 of said volume;

“The Soda No. 87 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 174 of said volume;

“The Soda No. 88 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 174 of said volume;

“The Soda No. 89 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 175 of said volume;

“The Soda No. 90 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 175 of said volume;

“The Soda No. 91 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 176 of said volume;

“The Soda No. 111 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 186 of said volume;

“The Soda No. 112 Placer Mining Claim,” the location notice of which said claim is recorded in Volume 82 of Mining Records, in said County of San Bernardino, State of California, at page number 186 of said volume.

You are hereby further notified that said sum of \$1200 (being \$100 for each of said claims) was expended by me for the [29] purpose of complying with the requirements of Section 2324 of the Revised Statutes of the United States and amendments thereof, concerning the performance of annual labor upon mining claims.

You are hereby further notified that the amount of \$100 was the amount required to hold each of said claims for the said year ending December 31st, 1911, and that said sum of \$1,200 was the aggregate amount required to hold said twelve claims for said year 1911.

You are hereby further notified that throughout said year of 1911 I was the owner of an undivided one-eighth interest in said claims and therefore a co-owner with you throughout said period, during which you also were the owner of an undivided one-eighth interest in said claims.

You are hereby further notified that subsequent to the making of said expenditures I transferred my said one-eighth interest to S. Schuler, and that she has transferred said one-eighth interest to Joseph K. Hutchinson, who is now the owner thereof.

You are hereby further notified that I, T. W. Pack, together with said S. Schuler, and said Joseph K. Hutchinson, also undersigned, have received no contribution from you for your proportion, to wit, one-eighth, of said expenditures, do, and each of us does hereby make demand upon you for contribution by you of your proportion of said expenditures, to wit, of the sum of \$150, or one-eighth of said sum of \$1,200.

You are further notified that if, within ninety (90) days from the personal service of this notice upon you, you fail or refuse to contribute your proportion of said expenditure, to wit, \$150, or one-eighth of said sum of \$1,200, by payment of the same to said Joseph K. Hutchinson, at Room 710, Claus Spreckels

Building, City and County of San Francisco, State of California, he being duly authorized to collect said money and receipt for the same, your said interest in said mining claims, and each of them [30] will become the property of the undersigned.

Dated, San Francisco, California, September 14, 1914.

(Signed) S. SCHULER.

T. W. PACK.

JOSEPH K. HUTCHINSON.

[Endorsed]: No. B. 50-Eq. U. S. District Court. Southern District, California, Southern Division. In Equity. E. Thompson, vs. Thomas W. Pack, Stella Schuler, Joseph K. Hutchinson. Bill in Equity. Filed Nov. 24, 1914. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. H. L. Clayberg, Clayberg & Whitmore, 937 Pacific Building, San Francisco, Attorneys for Complainant. [31]

In the District Court of the United States, Southern District of California, Southern Division.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and JOSEPH K. HUTCHINSON,

Defendants.

Restraining Order and Order to Show Cause.

WHEREAS, plaintiff above named has filed his verified bill in equity in the above-entitled cause

against the defendants above named praying for certain equitable relief and an order of this Court restraining and enjoining defendants and each of them, during the pendency of this suit and until the final determination thereof upon its merits, from in any way or manner casting a cloud upon the title of or taking any steps toward forfeiting or declaring forfeited any of plaintiff's right, title or interest in and to certain placer mining claims in said bill of complaint and hereinafter fully described, named and numbered; and,

WHEREAS, upon a reading of plaintiff's said bill of complaint it satisfactorily appears to the Court therefrom that plaintiff may suffer irreparable and irrevocable damage and injury, before the hearing of the order to show cause hereinafter set forth, unless, pending the hearing on said order to show cause, said defendants and each of them are by this Court restrained as hereinafter set forth, and other good cause appearing. [32]

NOW, THEREFORE, IT IS HEREBY ORDERED that you, the said defendants, Thos. W. Pack, S. Schuler and Jos. K. Hutchinson, and each of you, your and each of your attorneys, agents, servants and employees are hereby specially restrained and enjoined from in any way or manner taking any steps toward forfeiting or declaring a forfeiture of plaintiff's right, title and interest in and to certain hereinafter described placer mining claims, and each of them, pursuant to or in accordance with your pretended Notice of Forfeiture heretofore, and within ninety days prior to the date hereof, served upon

plaintiff herein, a copy of which is attached to the said bill of complaint and marked Exhibit "A," until the hearing of the application of plaintiff for an injunction *pendente lite* in this cause, which said application is hereby set for hearing before this Court on the 7th day of December, 1914, or until the further order of this Court;

IT IS FURTHER ORDERED that you and each of you appear before this Court at 10:30 o'clock A. M. on the 7th day of December, 1914, at the court-room of Division No. 2 of the District Court of the United States for the Southern District of California, in the Federal Building, in the City of Los Angeles, County of Los Angeles, State of California, and then and there to show cause, if any you have, why said restraining order, as hereinabove made, should not be made permanent during the pendency of this suit and until final determination thereof on its merits.

Said placer mining claims above named are described, numbered and named as follows, being situate on Searles Borax Lake, County of San Bernardino, State of California, the location notices of which said placer claims are recorded in Volume 82 of Mining Records in the office of the County Recorder of the said County of San Bernardino, State of California, at the following respective pages of said Volume 82 set down opposite and following the hereinafter [33] described, named and numbered placer mining claims:

"The Soda No. 68 Placer Mining Claim," at page 164 thereof;
"The Soda No. 69 Placer Mining Claim," at page 165 thereof;
"The Soda No. 70 Placer Mining Claim," at page 165 thereof;
"The Soda No. 71 Placer Mining Claim," at page 166 thereof;
"The Soda No. 72 Placer Mining Claim," at page 166 thereof;
"The Soda No. 87 Placer Mining Claim," at page 174 thereof;
"The Soda No. 88 Placer Mining Claim," at page 174 thereof;
"The Soda No. 89 Placer Mining Claim," at page 175 thereof;
"The Soda No. 90 Placer Mining Claim," at page 175 thereof;
"The Soda No. 91 Placer Mining Claim," at page 176 thereof;
"The Soda No. 111 Placer Mining Claim," at page 186 thereof;
"The Soda No. 112 Placer Mining Claim," at page 186 thereof.

Dated this 24th day of November, 1914.

BENJAMIN F. BLEDSOE,
Judge. [34]

[Indorsed]: No. B. 50-Eq. U. S. District Court,
Southern District of California, Southern Division.
In Equity. E. Thompson, vs. Thomas W. Pack,
Stella Schuler, Joseph K. Hutchinson. Restraining
Order and Order to Show Cause. Filed Nov. 24,
1914. Wm. M. Van Dyke, Clerk. By R. S. Zim-
merman, Deputy Clerk. H. L. Clayberg, Clayberg
& Whitmore, 937 Pacific Building, San Francisco,
Attorneys for Complainant. Eq. O. Bk. [35]

[Order Continuing Hearing to December 8, 1914.]

At a stated term, to wit, the July Term, A. D. 1914,
of the District Court of the United States of
America, in and for the Southern District of
California, Southern Division, held at the court-
room thereof, in the city of Los Angeles, on
Monday, the seventh day of December, in the

year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause coming on this day to be heard under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction *pendente lite* should not be issued herein, pursuant to the prayer of the bill of complaint; A. V. Andrews, Esq., appearing as counsel for complainant; Charles W. Slack, Esq., appearing as counsel for defendants; it is ordered that this cause be, and the same hereby is continued until Tuesday, the 8th day of December, 1914, at 10:30 o'clock A. M., for said hearing. [36]

[Order Submitting Application for Preliminary
Injunction.]

At a stated term, to wit, the July Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the eighth day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause having come on this day to be heard under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction *pendente lite* should not be issued herein, pursuant to the prayer of the bill of complaint; A. V. Andrews, Esq., appearing as counsel for complainant; Charles W. Slack, Esq., appearing as counsel for defendants; and said application for a preliminary injunction having been argued, in connection with the argument of the application for a preliminary injunction in cause No. B. 46—Equity. E. Thompson, Complainant, vs. Thomas W. Paek et al., Defendants, by Charles W. Slack, Esq., of counsel for defendants, and by A. V. Andrews, Esq., of counsel for complainant; it was ordered that this cause be, and the same thereby was submitted to the Court for its consideration and decision on complainant's application for a preliminary injunction and the argument thereof. [37]

[Order Granting Application for Injunction
Pendente Lite, etc.]

At a stated term, to wit, the July Term, A. D. 1914, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of Los Angeles, on Friday, the eleventh day of December, in the year of our Lord, one thousand nine hundred and fourteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK et al.,

Defendants.

This cause having heretofore been submitted to the Court for its consideration and decision under and pursuant to the order heretofore made and entered herein that defendants show cause why an injunction *pendente lite* should not be issued herein, pursuant to the prayer of the bill of complaint; and the Court having fully considered the same and being fully advised in the premises, now, in accordance with the conclusions of the Court, expressed in its opinion this day filed in cause No. 46 B.—Equity, E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants, it is ordered that complainant's application for said temporary injunction be, and the same

hereby is granted, counsel for complainant to prepare and present a suitable order in accordance herewith. [38]

[Opinion.]

*In the District Court of the United States, in and for
the Southern District of California.*

C. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,
Defendants.

This matter is before the Court on an order to show cause why a temporary injunction *pendente lite* should not issue restraining the defendants from putting of record certain Notices of Forfeiture with Affidavits of Service thereof; such notices being those provided in Section 2324 Revised Statutes of the United States, and Section 1426o of the Civil Code of the State of California; with reference to forfeiting of part interests of mining claims.

The bill in equity as filed contains much matter that seems to be immaterial, much that is purely "epithetic," to use an expressive phrase, and a great deal averred upon information and belief and not positively. With respect to this latter, the Court feels that it should not, of course, consider it upon this order to show cause, because of the fact that under the law the complainant, to be entitled to positive relief at this juncture, and in advance of a

hearing, must base his request for such relief upon positive allegations. Laying out of consideration, however, the matters referred to above, it may be said, that certain facts are stated with such positiveness and cogency as that they fall within the realm of indispute upon this hearing. Briefly summarized, they are: That the plaintiff in the year nineteen hundred and ten, in conjunction with the defendant Pack, [39] and certain other individuals mentioned, located and recorded one hundred and seventy-five certain placer mining claims, situate in the County of San Bernardino, State of California; That plaintiff is now, and ever since the day of said location, has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims, and each of them; That during the month of September, in the year nineteen hundred and fourteen, the defendant herein, caused to be served upon plaintiff a certain notice of forfeiture, set out in the bill of complaint, and by which it was sought, pursuant to the sections of the Revised Statutes and Civil Code above referred to, to forfeit the title of plaintiff in and to each and all of the one hundred seventy-five (175) described placer mining claims heretofore referred to; that said notice contained the appropriate statements that unless plaintiff, within ninety days after the service of the same upon him, paid to the defendants or to the defendant Joseph K. Hutchinson, for said defendants, the sum of seven hundred dollars (\$700), claimed to be one-eighth of the total amount of money claimed to have been expended by said defendant Pack, upon said

claims, in the years nineteen hundred and eleven (1911) and nineteen hundred twelve (1912), that the interest of plaintiff would become forfeited to the said Joseph K. Hutchinson. Plaintiff then alleges that the said Pack did not expend, or cause to be expended of his own money, during the years nineteen hundred and eleven (1911) and nineteen hundred and twelve (1912), or at any other time, the sum of fifty-six hundred dollars (\$5600), of which the said seven hundred dollars (\$700) was the one-eighth part, upon or for, the benefit of said placer mining claims, or at all; that at least twenty-eight hundred and thirty-six (\$2836) was contributed by plaintiff and his colocators to the defendant Pack, for the purpose of doing the assessment work upon the claims mentioned, for the years nineteen [40] hundred and eleven (1911) and nineteen hundred and twelve (1912). Plaintiff further alleges that whatever title or interest the said Hutchinson obtained or holds in and to the said claims, was obtained and is held for the sole use and benefit of the Foreign Mines and Development Company, and the American Trona Company, and the California Trona Company. It is also alleged that in the year nineteen hundred and twelve (1912), while plaintiff and his colocators were engaged in the performance of the annual assessment work upon said claims, they were forcibly prevented from completing the said assessment work, and were forcibly ejected and driven from said claims, by the said Foreign Mines and Development Company, the American Trona Company, and the California Trona Company.

If these facts thus alleged be true, and at this time the Court must assume them to be true, because no affidavit or answer in opposition to or in explanation of them, has been presented by the defendants, then it would appear that the defendants have no right to claim or exact a forfeiture, as against the plaintiff, for his failure to contribute his share of the assessment work, and that the proceedings on the part of defendants, leading up to the service of the notice of forfeiture, and in the recording thereof, are substantially a nullity, in so far as they seem to have effected a divestiture of plaintiff's undivided interest in and to the mining property in question. On such a state of facts, I apprehend the Court, after an accounting or other appropriate investigation, would make a decree determinative of the rights of the parties and the protection thereof. This decree, under the case as made by the facts to be taken as true would in its substantial aspects be in favor of the plaintiff. The only question for determination, then, is whether or not the plaintiff should be protected in his rights, pending such final determination by the Court, and whether or [41] not the strong arm of the Court should be employed at this time to enjoin the defendants from placing of record, that which plaintiff claims would constitute a cloud upon its title, to wit: The notice of forfeiture with the affidavit of service thereof. That it would constitute such a cloud, I think, is indisputably clear. It was held in *Pixley vs. Huggins*, 15 Cal. 128, that the true test as to whether or not a certain instrument would cast a cloud upon the title, upon the plaintiff's property,

was this: "Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed be required to offer evidence to defend a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary no shade would be cast by the presence of the deed." This decision has been cited frequently, and I apprehend states the law concisely. In this case it is apparent that the filing of the notice and affidavit of service, would *prima facie* serve to divest plaintiff of his interest in the properties and that it would require extrinsic evidence on his part to defeat a suit of ejectment, based upon the forfeiture apparently evidenced by the notice of labor done and failure to contribute thereto. For these reasons I am constrained to hold that plaintiff has presented a *prima facie* case, free from colorable doubt, is entitled to a temporary injunction *pendente lite*.

Plaintiff's counsel will draft an appropriate order.

BENJAMIN F. BLEDSOE,

Judge.

[Endorsed]: No. B 46-Eq. United States District Court, Southern District of California, Southern Division. C. Thompson, vs. Thomas W. Pack et al. Opinion Re Injunction *Pendente Lite*. Filed December 11, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [42]

[Order for Injunction Pendente Lite.]

District Court of the United States, Southern District of California.

B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

On the return of the order to show cause made by me in the above-entitled action on the 24th day of November, 1914, and returnable on the 7th day of December, 1914, and this cause coming on regularly for hearing on the return day thereof, upon the verified bill of complaint. After hearing Messrs. Clayberg & Whitmore for the complainants and Messrs. Charles W. Slack and Joseph K. Hutchinson, for the defendants, and no sufficient cause to the contrary being shown:

IT IS ORDERED that the said order to show cause be, and the same hereby is made absolute until the final determination of this suit. It is further ORDERED that you, the said defendants, Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, and each of you, your and each of your attorneys, agents, servants and employees, are hereby specifically restrained and enjoined from in any way or manner taking any steps towards forfeiting or declaring a forfeiture of plaintiff's right, title and interest in,

and to those certain placer mining claims named and described in the Bill of Complaint filed herein and each of them, pursuant to or in accordance with your pretended Notice of Forfeiture heretofore, and within ninety days prior to the date of the commencement of this suit served upon plaintiff herein, until the final hearing and termination of this suit or until the further order of this court.

The Clerk will issue the Writs accordingly.

Dated this 11th day of December, 1914.

BENJAMIN F. BLEDSOE,
Judge of Said District Court. [43]

[Indorsed]: "No. B. 50—Equity. In the District Court of the United States in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Order for Injunction *Pendente Lite*. Filed Dec. 15, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Clayberg & Whitmore, Attorneys for Dfts. Eq. Order Book." [44]

*In the District Court of the United States, in and for
the Southern District of California.*

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants.

Assignment of Error.

Now come Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, defendants above named, and make and file this their assignment of error:

I

That the District Court of the United States, in and for the Southern District of California, erred in giving, making and entering its order of the 11th day of December, 1914, granting the application of the above named complainant for a temporary injunction *pendente lite* in the above-entitled proceeding.

II.

That the District Court of the United States, in and for the Southern District of California, erred in giving, making and entering its order of the 11th day of December, 1914, wherein and whereby it ordered that a temporary injunction *pendente lite* be issued in the above-entitled proceeding, restraining the defendants in the above-entitled proceeding, and each of them, from filing affidavits of the service of the notice of forfeiture in the complaint on file in the above-entitled proceeding and in said temporary injunction *pendente lite* referred to and described.

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,

Solicitors for Defendants. [45]

[Indorsed]: "No. B. 50—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thomp-

son, Complainant, vs. Thomas W. Pack et al., Defendants. Assignment of Error (Order of Dec. 11, 1914). Original. Filed Dec. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal.” [46]

*In the District Court of the United States, in and for
the Southern District of California.*

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants,

Petition for an Order Allowing an Appeal.

The above-named defendants, Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, conceiving themselves aggrieved by the order entered on the 11th day of December, 1914, in the above-entitled proceeding, which said order granted the above-named complainant's application for a temporary injunction *pendente lite*, do, and each of them does, hereby appeal from said order to the United States Circuit Court of Appeals, for the Ninth Circuit, and they pray, and each of them prays, that this, their appeal, may be allowed; and that a Transcript of the record and proceedings and papers upon which said

order was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals, for the Ninth Circuit.

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,
Solicitors for Defendants.

And now, to wit, on December 24, 1914, it is ordered that the foregoing appeal be allowed as prayed for, upon giving bond in sum of \$250.00 for costs on appeal.

BENJAMIN F. BLEDSOE,
District Judge. [47]

[Indorsed]: "No. B. 50—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Petition for and Order Allowing Appeal. (Order of Dec. 11, 1914.) Original. Filed Dec. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal." [48]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants,

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That United States Fidelity & Guaranty Company, a corporation, duly incorporated under and by virtue of the laws of the State of Maryland and authorized by its charter and by law to become sole surety on bonds and undertakings, is held and firmly bound unto E. Thompson, in the full and just sum of Two Hundred Fifty Dollars (\$250.00), lawful money of the United States, to be paid to the said E. Thompson, her executors, administrators or assigns; to which payment the said United States Fidelity & Guaranty Company binds itself by these presents.

IN WITNESS WHEREOF, the United States Fidelity & Guaranty Company has caused these presents to be executed by its duly authorized attorney in fact and has caused these presents to be sealed with the seal of the United States Fidelity & Guaranty Company on this 24th day of December, in the year of our Lord one thousand nine hundred and fourteen.

WHEREAS, lately, at a District Court of the United [49] States, for the Southern District of California, Southern Division, in a suit depending in said Court between E. Thompson as complainant and Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson as defendants, an order was entered on the 11th day of December, 1914, in the above-entitled proceeding, which said order granted the above-named complainant application for a temporary injunction *pendente lite*. And the said Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, having obtained from said Court an order allowing an appeal to reverse the said order in the aforesaid suit, and a citation directed to the said E. Thompson citing and admonishing her to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, to wit, within thirty days after the 24th day of December, 1914.

Now, the condition of the above obligation is such that if the said Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson shall prosecute an appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

UNITED STATES FIDELITY & GUARANTY COMPANY.

[Seal]

By Van R. Kelsey.
Its Attorney in Fact.

State of California,
County of Los Angeles,—ss.

On this 24th day of December, in the year one thousand nine hundred and fourteen, before me, Hallie D. Winebrenner, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Van R. Kelsey, known to me to be the duly authorized attorney in fact of The United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the attorney in [50] fact of said Company, and the said Van R. Kelsey duly acknowledged to me that he subscribed the name of The United States Fidelity and Guaranty Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] HALLIE D. WINEBRENNER,
Notary Public in and for Los Angeles County, State
of California.

(Cancelled Revenue stamps, 2½c.)

Premium on bond—\$500.

[Endorsed]: No. B. 50—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack et al., Defendants. Undertaking on Appeal. The form of undertaking and sufficiency of surety approved. Benjamin F. Bledsoe, Judge. 12/25/14. Filed De-

cember 25, 1914. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Macomber & Pendleton, Attorneys, 915 Black Building, Los Angeles, Cal., A-2929, Main 5464. [51]

*In the District Court of the United States, in and
for the Southern District of California.*

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Defendants,

Praecipe for Record on Appeal.

To the Clerk of the District Court of the United States, in and for the Southern District of California, Southern Division:

Sir: You are hereby instructed to prepare a certified copy of the record in the above-entitled proceeding for use upon an appeal from the order heretofore given, made and entered in the above-entitled proceeding on the 11th day of December, 1914, granting the application of the above-named complainant for a temporary injunction *pendente lite* and ordering said injunction *pendente lite* to issue; said record will be made up of the following papers, records and proceedings in said above-entitled proceeding:

The bill of complaint therein;

The temporary restraining order and order to show

cause given and made therein on the 24th day of November, 1914;

The minute order made in the above-entitled proceeding upon the return of said order to show cause on the 7th day of December, 1914, showing the making of a motion *ore tenus* on behalf of the defendants in the above-entitled proceeding to [52] dissolve said temporary restraining order, and submitting said application for an injunction *pendente lite* and said motion;

The minute order in the above-entitled proceeding given, made and entered upon the 11th day of December, 1914, granting the said complainant's application for an injunction *pendente lite*;

The order given, made and entered in said proceeding on the 11th day of December, 1914, which said order restrained and enjoined defendants above named from doing certain acts in said order and in the bill of complaint in the above-entitled proceeding more particularly set out and described, and ordered that an injunction *pendente lite* issue in the above-entitled proceeding;

The injunction *pendente lite* issued pursuant to said order of December 11, 1914, which said injunction was issued and is dated the 15th day of December, 1914;

The assignment of error of the above-named defendants filed with their petition for an order allowing the appeal above specified and referred to:

You will forthwith make up your certified copy of the foregoing papers and transmit the same, with the original petition for an order allowing an appeal and

the citation issued thereon, with the return of the service of said citation, to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California.

San Francisco, Cal., December 23d, 1914.

CHARLES W. SLACK,
JOSEPH K. HUTCHINSON,

Solicitors for Defendants. [53]

Service of the Within Praeclipe for Record on Appeal this 23d day of December, 1914, is hereby admitted.

H. L. CLAYBERG,
CLAYBERG & WHITMORE,
Attorneys for Complainant.

[Endorsed]: No. B. 50—Equity. In the United States District Court, in and for the Southern District of California, Southern Division. E. Thompson, Complainant, vs. Thomas W. Pack, et al., Defendants. Praeclipe for Record upon Appeal. (Order of Dec. 11, 1914.) Original. Filed Dec. 24, 1914. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Charles W. Slack, Joseph K. Hutchinson, Solicitors for Defendants, 923 First National Bank Bldg., San Francisco, Cal. [54]

[Certificate of Clerk U. S. District Court to
Transcript of Record.]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

No. B. 50—EQUITY.

E. THOMPSON,

Complainant,

vs.

THOMAS W. PACK, STELLA SCHULER, and
JOSEPH K. HUTCHINSON,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing fifty-four (54) typewritten pages, numbered from 1 to 54, inclusive, and comprised in one (1) Volume, to be a full, true and correct copy of the bill of complaint, temporary restraining order and order to show cause given and made on the 24th of November, 1914, minute orders of the 7th, 8th and 11th days of December, 1914, respectively, opinion of the Court given in case B. 46—Equity, S. D. upon the making of the order granting application for injunction *pendente lite*, order of December 15, 1914, granting injunction *pendente lite*, assignment of error, petition for and order allowing appeal, undertaking on appeal, and praecipe for transcript of record on appeal in the above and therein entitled ac-

tion; and I do further certify that the above constitute the record on appeal in said action as specified in the said praecipe for transcript of record on appeal, filed on behalf of the appellants in said action.

I do further certify that the cost of said transcript [55] is \$31.50 the amount whereof has been paid me by Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, the appellants in said action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court of the United States of America, in and for the Southern District of California, Southern Division, this 30th day of December, in the year of our Lord, one thousand nine hundred and fourteen, and of our Independence the one hundred and thirty-ninth.

[Seal] WM. M. VAN DYKE.

Clerk of the District Court of the United States of America, in and for the Southern District of California.

[Ten cents Internal Revenue Stamp. Canceled Dec. 30, 1914. Wm. M. Van Dyke.] [56]

[Endorsed]. No. 2536. United States Circuit Court of Appeals for the Ninth Circuit. Thomas W. Pack, Stella Schuler and Joseph K. Hutchinson, Appellants, vs. E. Thompson, Appellee. Transcript of Record. Upon Appeal from the United States

District Court for the Southern District of California, Southern Division.

Filed December 31, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.





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